Central Law Journal.

ST. LOUIS, MO., JANUARY 8, 1897.

On January 1st last, the CENTRAL LAW JOURNAL began its 24th year, and I, its third editor, take the opportunity offered me by the publishers to say a word or two concerning its past history and its present prospects.

What strikes me in the first instance as worth noting is that the JOURNAL is now nearly a quarter of a century old. I look back at the law periodicals which were alive when it was born; at those which have arisen during its life, and at those which have died, while it still survives. Not more perhaps than two of at least a score which were born before it are now remembered; and of another score or more which have sprung up during its existence, how many are ten years old?

In the past 23 years there have been but few changes in the CENTRAL LAW JOURNAL. It has had in all seven different editors. When it was founded the official reports were years behind the work of the courts. Then the profession saw in advance of those reports only such as the JOURNAL and one or two of its contemporaries could print and to the number of five or six a week. Then the editor was obliged to rely for these cases on the courtesies of the counsel engaged in them who had obtained a copy of the opinion, or else to have to make a trip to the State capitol, read the opinions filed and bring away copies of the important ones. Now, the editor has before him every week the whole field of judicial utterance, State and National. Then the question was how to get material; now it is what to take and what to reject from the overwhelming mass.

In all these years there has been hardly a change in the purpose of the JOURNAL. It was intended by its founders as a paper for the practicing lawyer. Once or twice the editor of the day has been tempted to stray into controversies with rival editors over some question of conduct or circulation; but these interruptions have been occasional and brief. To make it a practitioner's paper, to give it an actual money value to the busy lawyer such as his text books and reports and digests—the books of his trade—have, has been all along the aim of both editor and publishers. There have been journals which have attempted to be critical, literary and scientific, as well as practical, but their names with but one creditable exception, are now almost forgotten, and this side of legal journalism seems to have gone to the law schools, several of which are now publishing magazines of this character. They, however, do not appeal to nor are they much noticed by the practicing lawyer, for they are in most cases rather theoretical and always academic.

The CENTRAL LAW JOURNAL was never more practical than to-day; never more completely what it started out to be, and upon which has been based its prosperity and long life—the journal of the practitioner.

Lastly, the editor of 1877-1881 is glad to meet again in the publishers of to-day the same gentlemen who published the JOURNAL during the four years he occupied the editorial chair.

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The Supreme Court of the United States has just held constitutional the Wright irrigation law of California. Fallbrook Irrigation Dist. v. Bradley, 17 S. C. Rep. 56. It will be recalled that Judge Ross of the United States Circuit Court for the Southern District of California, at the hearing below, declared the statute invalid on the ground that it involved taking property for other than a public use, 68 Fed. Rep. 498. It was claimed that "the citizen is deprived of his property without due process of law if it be taken by or under State authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain," and a Federal question was thus raised under the Fourteenth Amendment, even although the taking was under the authority of a State instead of the Federal Government. The courts of the State of California had previously held the act valid. The Supreme Court, in an opinion by Mr. Justice Peckham, reversing the lower Federal Court, holds that when the highest court of a State has decided that a certain statute is in harmony with the State constitution, a Federal court will not be justified in holding adversely on the ground that the decision of the State court is in con-

flict with the general principles of constitutional law; that water used for the irrigation of lands which are actually arid is used for a public purpose, and, therefore, a statute providing for the irrigation of arid lands, and authorizing an assessment on such lands to pay the cost of the irrigation, does not deprive the landowner of property without due process of law, by means of an assessment not made for a public purpose, and that to render the use of water for the irrigation of arid lands a public use, every resident of the irrigation district need not have the right to use the water. If each landowner has the right to use a proportionate share upon the same terms as all the others, the use is a public, and not a private, one.

The substance of the conclusion of the court is to be found in the following language by Mr. Justice Peckham:

"Viewing the subject for ourselves, and in the light of these considerations, we have very little difficulty in coming to the same conclusion reached by the courts of California. The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect. In general, the water to be used must be carried for some distance, and over or through private property, which cannot be taken *in invitum* if the use to which it is put be not public; and, if there be no power to take property by condemnation, it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. Cole v. Le Grange, 113 U. S. 1, 5 Sup. Ct. Rep. 416. A private company or corporation, without the power to acquire the land *in invitum*, would be of no real benefit; and, at any rate, the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual. No one owner would find it possible to construct and maintain waterworks and canals any better than private corporations or companies, and, unless they had the power of eminent domain, they could accomplish nothing. If that power could be conferred upon them, it could only be upon the ground that the property they took was to be taken for a public purpose. While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate, and thus to bring into possible cultivation, these large masses of otherwise worthless lands, would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not, therefore, a fatal objection to this legislation. It is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic, or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus of the whole of the water, as he may choose."

The court also cites Hagar v. Reclamation Dist., 111 U. S. 701, in which it was held that the power of the legislature of California to prescribe a system for reclaiming swamp land was not inconsistent with any provision of the federal constitution, saying that the two cases do not essentially differ. It is pointed out that such power of reclamation does not rest only upon the ground of preserving the public health.

NOTES OF RECENT DECISIONS.

MUNICIPAL CORPORATION — UNREASONABLE ORDINANCE.—In City of Grand Rapids v. Newton, 69 N. W. Rep. 84, decided by the Supreme Court of Michigan, it was held that a city ordinance providing that no person shall allow or permit any indecent, loud or boisterious noise, or any fighting or other disturbance, in or about his house or tavern, inn, saloon, cellar, shop, office, or other residence or place of business, or permit drunkards or persons having the reputation or name of being prostitutes to congregate, visit or remain therein, is unreasonable, as not limited in its application to such assemblages or to such places of business as are properly within police control, and consequently void.

ARREST — OFFER OF REWARD — DEPUTY SHERIFF—ESTOPPEL.—In Witty v. Southern Pacific Co., 76 Fed. Rep. 217, decided by the United States Circuit Court, Southern District of California, it appeared that three men, in search of certain criminals for whose arrest a reward had been offered, fired upon and wounded one of them, who was concealed behind a pile of straw, so that the extent of his injuries was unknown. One of the attacking party, being also wounded, was conveyed to a distant town by another, who returned next morning, accompanied by a deputy sheriff and others. The third member of the original party remained on watch near the straw pile, all night, to prevent the criminal's escape. The deputy sheriff, with other persons, approached the straw pile, and, finding the wounded man utterly incapable of offering the least resistance, formally arrested him. It was held that the arrest was in fact effected before the deputy's arrival, and the latter was not entitled to claim the reward, and that it is the duty of a deputy sheriff, when specific information is conveyed to him that a felon is at a particular place within his jurisdiction, to take measures for his prompt apprehension, and he cannot claim that an arrest thus effected is made in his private capacity, so as to entitle him to a reward offered by private parties. The court distinguished Russell v. Stewart, 44 Vt. 170, and followed Warner v. Grace, 14 Minn. 487 (Gil. 364). It appeared also in the case that on the day after the arrest the deputy stated to an agent of defendants that only those who made the fight were entitled to the reward, and that he himself would not claim any part of it. Thereupon the entire amount was paid to the searching party. It was held that the deputy was estopped from thereafter claiming the reward for himself.

STATUTE OF FRAUDS—PAROL PROMISE AS TO WILL.—In Dicken v. McKinlay, 45 N. E. Rep. 134, decided by the Supreme Court of Illinois, it was held that a legal adoption by one, of her deceased son's only daughter, as her own child, is not such part performance as will take out of the statute of frauds the parol contract of the grandmother, in consideration of consent to the adoption, to make no will which should deprive the child of any portion of the grandmother's estate which the child would take as heir if the grandmother made no will. It was further held that a contract to make no will which will deprive one of property which she would take as heir if there was no will, having relation to real estate and personalty, and being within the statute of frauds as to the former, and not being divisible, is wholly void. The court said in part:

> The weight of authority is in favor of the position that a man may make a valid agreement to dispose of his property in a particular way, by will, and that such contract may be enforced in equity, after his decease, against his heirs, devisees or personal representatives. 22 Am. & Eng. Enc. Law, p. 974, and cases cite d in note 2; Schouler, Wills (2d ed.), sec. 454; Wat. Spec. Perf. Cont. sec. 41; Fry, Spec. Perf. (3d ed.) sec. 223; Weingaertner v. Pabst, 115 Ill. 412, 5 N. E. Rep. 385. But such contracts are looked upon with suspicion, and are only sustained when established by the clearest and strongest evidence. *Id.* There is a want of harmony among the decisions in regard to the enforcement of such contracts when they are oral, and in regard to the scope and applicability to them of the statute of frauds. Without entering into a discussion of the authorities upon the subject, we regard the case at bar as governed by the recent decision in this court in the case of Pond v. Sheean, 132 Ill. 312, 23 N. E. Rep. 1018. In the Pond Case, a person, having no children of his own, took an infant daughter of a relative of his wife to raise as a member of his family, and promised orally, with his wife's consent, that if the child's father would permit her to become a member of his family, and assume the name of her adopter, and allow her to live with the family of the latter, he would, on his death and that of his wife, give the child all the property he might own. The contract was fully performed by the child and her father. She lived with her adopted parents from the time she was 4 years old until she reached the age of 29 years, and was married, rendering, all this time, the same services as though she was an own child. But it was there held that a court of equity would not enforce a

specific performance of the oral contract; that the agreement to make provision for the child by will was, so far as the real estate was concerned, an agreement for the sale of such real estate; that, as the agreement was merely verbal and the child never obtained possession of the property under it, it was void under the statute of frauds; that payment of the purchase money without taking possession is not sufficient to take such a case out of the statute of frauds; and that a court of equity will not decree the specific performance of a parol agreement to convey lands where the purchaser has not entered into possession under the contract. Here the adoption of the plaintiff in error by her grandmother did not require a change of name, because her name, as well as that of her grandmother, was Dicken; nor was her relation, as expectant heir of her grandmother in the event of the latter's death without making a will, changed by the adoption, because, as the only child of her deceased father, she would have inherited one-fifth of the estate from her grandmother if the latter had died intestate, without any legal act of adoption. It was not necessary to adopt her to make her the heir of her grandmother. As adopted child she would inherit no greater interest than would have descended to her as grandchild. As the grandmother only lived about six months after the adoption, she received but little from the plaintiff in error in the way of services or companionship. But, even if the formal and perfected adoption was the consideration for the agreement alleged in the bill, and the deceased received and accepted such consideration, still the agreement was not removed from the operation of the statute of frauds, any more than the payment of purchase money would have relieved it from such operation, because no possession was taken of the real estate by the plaintiff in error.

Counsel for plaintiff in error claim that the Pond Case is different from the present case upon the ground that here there were proceedings under the statute resulting in a legal adoption, while there no formal adoption took place. We regard this distinction as immaterial. The services of Mrs. Pond for 25 years in the case cited constituted a consideration as valuable as is a mere formal act of adoption. The material circumstance in the case at bar, as it was in the Pond Case, is that no possession was taken of the land under the contract, and therefore the contract was subject to the operation of the statute.

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If the verbal contract set up in the bill is not a verbal contract to devise to plaintiff in error a certain portion of her grandmother's estate, or what is equivalent thereto a verbal contract to make sale to her of a certain portion of the estate, then it is difficult to see upon what theory plaintiff in error claims to be entitled to the relief prayed for in her bill. The bill prays that the oral contract therein set forth may be enforced against the defendant. By the will of the testatrix the title to the realty has passed to the defendants, her surviving children; and an enforcement of the contract against them would require them to convey to the plaintiff in error the portion of the realty claimed by her. But this can only be done by charging the land in the hands of the defendants with a trust in favor of plaintiff in error. The theory upon which the courts enforce an agreement to execute a will in a certain way, against the representatives and estate of the party who makes the agreement, is "to construe such agreement, unless void under the statute of frauds, or for other reason, to bind the property of the testator or intestate, so ar as to fasten a trust upon it in favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased." Bolman v. Overall, 80 Ala. 451; 3 Pars. Cont., marg., p. 406.

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Even if the contract here is, as counsel for plaintiff in error contend, a contract by which the deceased promised to let the statute of descents have its operation and not a promise to make a devise in a particular way, it is, nevertheless, a merely verbal agreement, and as such could not have the effect to fastening a trust upon the real estate devised to the defendants. A trust which affects land must be in writing. Tyler v. Tyler, 126 Ill. 525. Under "our statute of frauds, all trusts shall be created or evidenced by writing, except resulting trusts, or else they are void." Hovey v. Holcomb, 11 Ill. 660.

CRIMINAL LAW — CREDIBILITY OF WITNESS. —The Supreme Court of Nebraska, in Argabright v. State, 69 N. W. Rep. 102, decides that the jury are the sole judges of the credibility of witnesses, and it is error for a trial court, in a criminal case, to single out a particular witness for the defense by name, and give to the jury a cautionary instruction, which applies directly to his testimony, the rule of "*Falsus in uno, falsus in omnibus.*" The court said in part:

The instruction attacked is as follows: "If the jury believe from the evidence, that the witnesses, Lewis Morris, Hilton Stanley, and Perry Walz have willfully sworn falsely on this trial as to any matter or thing material to the issue in the case, then the jury are at liberty to disregard their entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial." It is contended that this portion of the charge of the court is erroneous, in that it singles out certain individuals of the witnesses, and directs especial attention to them and their testimony, respectively; that such action of the trial court was well calculated to induce a belief or an impression in the minds of the jury, or in the mind of any one or more of them, of the court's disbelief of the testimony of the witness or witnesses specifically named, or, at least, that the court viewed it with suspicion, and felt inclined to discredit it. One of the governing principles of the question involved is that it is for the jury, and not the court, to pass upon the credibility of witnesses, and to determine the weight to be accorded their testimony (Hedman v. Anderson, 6 Neb. 392; Heldt v. State, 20 Neb. 492, 30 N. W. Rep. 626; State v. Cushing, 29 Mo. 215; Shellabarger v. Nafus, 15 Kan. 547; State v. Stout, 31 Mo. 406), and extending this doctrine, and applying it to an instruction, on the maxim, "*Falsus in uno, falsus in omnibus.*" "The credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly a matter for the jury." Schuek v. Hagar, 24 Minn. 339. "It is error to single out a particular witness, and to direct such a cautionary instruction, although couched in proper terms, against his testimony. The reason is that such a course tends to convey to the minds of the jury the impression that the testimony of the particular witness is disbelieved by the judge, and is to be disregarded—a question which it is their province to determine, and not his." 2 Thomp. Trials, p. 1772,

§ 2423. "It is not usual for a court to point out a particular witness, and tell the jury to disregard his testimony, if they think he has testified falsely in any material particular; and, when this is done, and all instructions upon the defense which this witness' testimony tends to establish are refused, the jury must understand the court to be of opinion that no case of self-defense is made out,—in other words, that the testimony of the suspected witness is entirely unworthy of credit. This conclusion may be correct, but it is the province of the jury, and not of the court, to pass upon the credibility of witnesses." State v. Stout, 31 Mo. 406. "It is improper for the court to instruct the jury as to the weight they should give to particular testimony, or to the testimony of a particular witness, or to put a particular witness into undue prominence by charging the jury to find according to their belief in his evidence, if such charge tends to ignore other testimony—citing Chase v. Iron Works, 55 Mich. 139, 20 N. W. Rep. 827; Springett v. Colerick, 67 Mich. 362, 33 N. W. Rep. 683. On the other hand, a trial judge has no right so to instruct the jury as manifestly to reflect upon a particular witness—citing Railroad Co. v. Martin, 41 Mich. 667, 672, 3 N. W. Rep. 173, 175; Wheeler v. Wallace, 53 Mich. 355, 19 N. W. Rep. 33, 37." "An instruction that, if the jury find that any witness has testified falsely as to any material fact in the case, they are at liberty to reject and disbelieve all of his testimony, clearly and sufficiently states the law on the subject; and it is not error for the court to refuse to give a request applying such rule to a particular witness, and challenging the attention of the jury to particular portions of his testimony which the request assumes as false." Fraser v. Haggerty, 86 Mich. 521, 49 N. W. Rep. 616. "It is not proper for the court, in a criminal case, to designate the evidence of a witness who is not an acknowledged accomplice, and caution the jury against giving credence to it. Casting the influence of the court against the testimony of a particular witness, or the character of the evidence he gives, is not the usual way of either affecting the credibility of witnesses or the weight of testimony." Rafferty v. People, 72 Ill. 37. In the case of State v. Kellerman, 14 Kan. 135, it was said: "Where an instruction is asked, that if a particular witness, naming him, has willfully testified falsely, etc., the justice should disregard his entire testimony, it is not error for the court to refuse such instruction, and substitute one that, if any witness has willfully testified falsely, etc." And it was further observed, on the same subject: "With reference to the first, we have little difficulty. The rulings of the court were unquestionably correct. For instance, the appellant asked the court to instruct the jury that, if one witness, naming him, testified willfully, falsely, etc., they must disregard his entire testimony. Instead of this, the court charged that if any witness testified willfully, falsely, etc. The latter is the proper way. To single out a witness, and by name give such an instruction in reference to him, suggests a suspicion, if it does not imply a belief, on the part of the court, of the witness' perjury." See, also, Cline v. Lindsey (Ind. Sup.), 11 N. E. Rep. 441. It is error to single out and instruct upon the evidence of a particular witness. Muely v. State (Tex. App.), 19 S. W. Rep. 915. In the opinion in Housh v. State, 43 Neb. 163, 61 N. W. Rep. 573, in considering an objection alleged against an instruction, it was stated by Post, J.: "Exception was taken to the following paragraph of the instructions: 'Under the law of this State, the accused is a competent witness in his own behalf, and you are bound to consider his testimony; but, in determining what weight to give to his testimony, you may weigh it as you would the testimony of any other witness, and you may take into consideration his interest in the result of the trial, his manner, and the probability or improbability of his testimony, and giving to his testimony such weight as, under all the circumstances, you think it entitled to.' Were the question an open one at this time, the writer would with reluctance sanction a practice which permits any reference by the court to the subject of the prisoner's credibility as a witness. There is, on principle, no more reason to call the attention of the jury to him, and to caution them to consider his interest as affecting his credibility, than for like caution with respect to any other witness; but that question has been fully settled in this court by decisions in conformity with the practice in this case, which we are constrained to follow. See St. Louis v. State, 8 Neb. 405; Murphy v. State, 15 Neb. 383, 19 N. W. Rep. 489." In the opinion in the case of Watson v. Roode, 30 Neb. 264, 46 N. W. Rep. 493, one of the matters under consideration was the refusal of the trial court to give an instruction to the jury worded as follows: "The court instructs the jury that, if they believe, from the evidence, that the plaintiff, Orange A. Roode, is a person of bad reputation for truth and veracity in the neighborhood where he resides, then, as a matter of law, this fact tends to discredit his testimony, and the jury may entirely disregard it, except in so far as he is corroborated by other credible testimony, or by facts and circumstances proved on the trial." And of this action it was said: "The defendant introduced several witnesses, who testified that the plaintiff's reputation for truth and veracity in the neighborhood where he lived was bad. In view of this testimony, the jury should have been told what weight should be given to the plaintiff's testimony. The request contained a correct statement of law, and, as it was not covered by the instructions given, it was error to refuse it." And in the syllabus of the opinion it was stated: "When the general reputation of a witness for truth and veracity in the neighborhood where he resides is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other creditable testimony."

Of the questions presented in the last mentioned case it may be said that, in an effort to impeach a witness on the ground that his reputation for truth and veracity is bad, the witness is necessarily, as a part of the attempted impeachment, singled out by name in the questions propounded, and the evidence directed specifically against him and his reputation for speaking the truth. Hence, there is no impropriety in the trial court reading, as a portion of a charge to the jury, an instruction in which the witness sought to be impeached is named, and the jury told to apply the proper tests and rules. In the application of the rule invoked in the case at bar, that of "*Falsus in uno, falsus in omnibus*," the question of whether any one of the witnesses has willfully given false testimony on any material point, and, if so, which of the witnesses has so testified, must be determined from a view and comparison of all the evidence adduced—which witness or set of witnesses, if any, has so sworn falsely, being as much a fact to be determined as any other portion of the inquiry; and its settlement, as in all points of fact, is one peculiarly and exclusively within the province of the jury. Believing, as we do, that to single out a witness or witnesses by name, and instruct the jury with regard to him or them, and the weight or credibility to be accorded his or their test

mony, is subject to the infirmity that it may mislead the jury, or some members thereof, to believe that the presiding judge doubts the integrity and truthfullness of such witnesses or witness, and discredit be thus cast upon testimony, when the entire question should have been solved by the jury, and, moreover, that all difficulty may in all cases be avoided, and the purpose sought be subserved, and effectually and properly attained, by giving a general instruction on the subject, applicable to any and all witnesses, we do not think it wise or best to extend the approval of this court to a doctrine or rule under which trial courts may designate witnesses by name in instructions upon the weight and credibility which may be given the testimony, beyond what has already been announced on the subject. Hence we must disapprove the instruction given in the case at bar as improper and erroneous. The judgment and sentence of the district court will be reversed, and the case remanded.

SCOPE OF A LIS PENDENS.

The doctrine of *lis pendens* is found clearly announced in the ordinances of Lord Bacon.[1] It is chrystallized in the maxim *pendente lite nihil innovetur*. This doctrine is, that no one can acquire an interest in the subject-matter of a suit during the pendency thereof from any of the defendants therein to the prejudice of the plaintiff; otherwise, by transfer of interest, it might be necessary to bring in new parties, and lawsuits could thereby be rendered interminable.[2] Formerly, in England, when the subpœna was served prior to the filing of the bill of complaint, the *lis pendens* began from the filing of the bill, and reverted to the service of the summons.[3] Now, however, the lien begins upon the service of the subpœna or summons after the bill has been filed.[4] Such summons may be served in the manner prescribed by statute, by personal service, by leaving it at the home of the defendant, or by publication when allowed.[5] When by statute a suit is declared to be instituted by the filing of the bill and the issuance of a summons, the lien attaches prior to the service of the summons.[6] It is considered to be a hard rule and is not favored by the courts, and, if a party makes a slip in his proceedings, it is said the courts will not assist him in rectifying his mistake.[7]

Essentials in Creating the Lien.—The bill must be filed in good faith and not be collusive.[8] So if the bill be given to the clerk to indorse, and be then taken away by the party, it is not considered to be so filed as to create a *lis pendens*.[9] The property must be well described in the pleadings, since the *lis pendens* only extends to what is claimed in the pleadings, and relates to property so described that any one can identify it by such description.[10] The law imports notice of such facts as are alleged in the petition, which are pertinent to the issue, and of the contents of exhibits.[11] Such description need not be a particular one, when sufficient description is given to enable the parties to understand what property is sought to be charged by the suit; as where all the land belonging to a party at his decease is sought to be charged.[12] The property described must be such as can be affected by a *lis pendens*, and the court must have jurisdiction over the person and the property.[13] If the pleadings are amended and all the material grounds for relief were stated in the original petition, the *lis pendens* dates from the original filing; if the amendment inserts a new equity, or new claim, or a different or distinct ground of relief, then as to such new matter the *lis pendens* begins from the filing of the amendment.[14] The notice only extends to those who obtain title after the institution of the suit from one of the defendants in such suit.[15] Where the complainant has neither title to the property in controversy, nor a lien on it, at the time of its purchase by an innocent party, such party

[1] Murray v. Ballou, 1 Johns. Ch. 566.

[2] Hailey v. Ano, 136 N. Y. 569; Wortham v. Boyd, 66 Tex. 401; Randall v. Lower, 98 Ind. 255; Union T. Co. v. Southern, etc. Co., 130 U. S. 565; Bellamy v. Sabine, 1 De G. & J. 566; Hayden v. Bucklin, 9 Paige, 512.

[3] Burleson v. McDermott, 57 Ark. 229; Lincoln & Co. v. Rundle, 34 Neb. 559.

[4] Allison v. Drake, 145 Ill. 500; Franklin S. Bank v. Taylor, 131 Ill. 376; Norris v. Ile, 52 Ill. 190; Murray v. Ballou, 1 Johns. Ch. 566; Diamond v. Lawrence Co., 37 Pa. St. 353; Walker v. Goldsmith, 14 Oreg. 125; Skeel v. Spraker, 8 Paige, 182.

[5] Hayden v. Bucklin, 9 Paige, 512.

[6] Burleson v. McDermott, 57 Ark. 229; Jordan v. Everett, 93 Tenn. 390; Rothschild v. Kohn, 93 Ky. 107.

[7] Walker v. Goldsmith, 14 Oreg. 125.

[8] Allison v. Drake, 145 Ill. 500; Diamond v. Lawrence Co., 37 Pa. St. 353; Skeel v. Spraker, 8 Paige, 182.

[9] Wilkinson v. Elliott, 43 Kan. 590.

[10] Oliphant v. Burns, 146 N. Y. 218; Miller v. Sheny, 69 U. S. 237; Leuders v. Thomas, 35 Fla. 518.

[11] Walker v. Goldsmith, 14 Oreg. 125; Puckett v. v. Benjamin, 21 Oreg. 370; Norris v. Ile, 152 Ill. 190; Rothschild v. Kohn, 93 Ky. 107.

[12] Arrington v. Arrington, 114 N. C. 151.

[13] Norris v. Ile, 152 Ill. 190.

[14] Norris v. Ile, *supra*.

[15] Miller v. Sheny, 2 Wall. 237; Terrell v. Allison, 88 U. S. 289; Travis v. Supply Co., 42 Kan. 625.

is not affected by the judgment finally rendered.[16] An innocent purchaser from the defendant to a suit of his interest in the property, which is the subject of the suit, is not charged with notice of the interest of another defendant in the same property, though it appeared on the face of the pleadings to which it was not necessary for any of the purposes of the suit to give effect.[17] The law of *lis pendens* does not prevent a defendant from purchasing from a person, not party to the suit, a title superior to complainant's title and setting it up to defeat his title.[18] It was held that a suit in partition was a notice as to the complete title, as its object was to determine the rights of all parties interested therein, and though new parties were subsequently introduced, yet all purchasers *pendente lite* from any of the interested parties took subject to the final judgment.[19] A *lis pendens* is unnecessary as against those who buy with knowledge of the adverse rights of others, and their purchases are subject to such right, and if suit be pending subject to its results, though the law of *lis pendens* may be inapplicable.[20]

How the Lis Pendens may be Vitiated.—To maintain the *lis pendens*, the bill must be followed by a decree; and it falls, if the bill is voluntarily abandoned or dismissed by the complainant.[21] The bill must also be duly prosecuted,[22] but mere lapse of time would not be considered to vitiate the *lis pendens*, unless it was such as to induce the belief that the prosecution had been abandoned.[23] The *lis pendens* is lost by a dismissal of the suit.[24] A writ of error is regarded as a new suit, and a purchase without notice, after the termination of a suit and before a writ of error is sued out, will be protected.[25] So a bill of review, taken after the time usually allowed, was considered not to operate as a *lis pendens;* but whether an innocent purchaser, after judgment of dismissal but before the time allowed for appeal or writ of error had expired, should be protected, was admitted to be a controverted question.[26] In a case where a party purchased after the time for appealing has passed, he was considered to have bought subject to the suit, the decree being set aside as being unwarranted. The court stated that a purchaser must ascertain at his peril whether the decree is warranted.[27] The dissolution of a temporary injunction while the suit still goes on does not affect a *lis pendens.*[28]

Enforcing a Lis Pendens.—It is said that a successful claimant can enforce his judgment by ignoring the rights or claims of a purchaser *pendente lite*, and acting as though he had never interfered with the property.[29] It may, however, sometimes be necessary to obtain a writ of assistance;[30] and in case the purchaser has obtained the legal title, a bill in equity may be required.[31]

Lis Pendens as to Real Estate.—The rule of *lis pendens* is always applicable in suits affecting the title to real estate.[32] Divorce suits have been filed, claiming alimony in property specially described in the suit. Some courts hold, that *lis pendens* apply to such suits;[33] others disallow such application, alleging that the claim for alimony does not apply to any specified part of the husband's estate, nor does such claim become a lien till it is allowed by the decree.[34] One who attaches real estate is not regarded as an innocent purchaser, and is bound by a suit concerning the title to said land against his debtor, wherein the summons was served before he obtained a judgment in his attachment suit.[35] One who took a mortgage on real estate, while a suit to foreclose the vendor's lien was pending, was held to be a

[16] McCutchen v. Miller, 31 Miss. 65.
[17] Bellamy v. Sabine, 1 De G. & J. 566.
[18] Douglas v. Davies, 23 Ill. App. 618.
[19] McCloskey v. Barr, 48 Fed. Rep. 130.
[20] Manaudas v. Mann, 25 Oreg. 597; Pacific M. Co. v. Brown, 8 Wash. 347; Scotland Co. v. Hill, 112 U. S. 183.
[21] Allison v. Drake, 145 Ill. 500.
[22] Skeel v. Spraker, 8 Paige, 182; Diamond v. Lawrence Co., 37 Pa. St. 353.
[23] Norris v. Ile, 152 Ill. 190; Hayes v. Nourse, 114 N. Y. 595.
[24] Wortham v. Boyd, 66 Tex. 401; Karr v. Burns, 1 Kan. App. 232.
[25] Macklin v. Allenborg, 100 Mo. 337.
[26] Rector v. Fitzgerald, 59 Fed. Rep. 808.
[27] Ritson v. Dodge, 33 Mich. 463; Cook v. French, 96 Mich. 525.
[28] Hixon v. Oneida Co., 82 Wis. 515.
[29] Norris v. Ile, 152 Ill. 190; Skeel v. Spraker, 8 Paige, 182.
[30] Terrell v. Allison, 88 U. S. 289.
[31] Powell v. Campbell, 20 Nev. 232.
[32] Faulkner v. Vickers, 94 Ga. 531; Dodd v. Lee, 57 Mo. App. 167; Lacassagne v. Chapuis, 144 U. S. 119; McCutchen v. Miller, 31 Miss. 65.
[33] Powell v. Campbell, 20 Nev. 232; Wilkinson v. Elliott, 43 Kans. 590.
[34] Scott v. Rogers, 77 Iowa, 483; Houston v. Timmerman, 17 Oreg. 499.
[35] Cotton v. Dacey, 61 Fed. Rep. 481; Puckett v. Benjamin, 21 Oreg. 370.

purchaser *pendente lite*, though the vendor's deed stated that the consideration had been fully paid.[36] One who fails to record his deed to real estate till a suit affecting his grantor's title thereto has been commenced, is bound, as though he were a purchaser *lite pendente* by the judgment rendered therein,[37] even though the plaintiff had knowledge of the existence of his deed.[38] The last decision is due to the provisions of a statute, declaring that by reason of such subsequent registration the grantee in such deed shall be deemed a subsequent purchaser or incumbrancer. A purchaser of real estate during the pendency of a bill to foreclose a mortgage thereon is not affected by the doctrine of *lis pendens*, if such mortgage was not then of record in the register's office, because by statute a purchaser has a right to presume there is no incumbrance upon an estate if none is shown in the register's office.[39] A *bona fide* purchaser of real estate without notice *pendente lite* is liable for the property itself, but not personally, nor for the rents and profits.[40]

Lis Pendens as to Personal Property.—There is great diversity in the rulings of the courts as to the application of *lis pendens* to suits concerning personalty. It is said to apply to personal property,[41] though that has been questioned where the property was movable.[42] It has been applied to slaves, but under the laws of the southern States slaves were largely assimilated to real estate.[43] It was realized that the universal application of the law of *lis pendens* would greatly hamper commercial transactions. As a result the law has been held inapplicable to money and bank notes,[44] to commercial paper,[45] though it is sometimes confined to commercial paper not yet due,[46] to municipal bonds,[47] to corporate stock,[48] to corporate bonds,[49] and to articles of ordinary commerce.[50] Though we derive the law of *lis pendens* from the English, yet it was claimed in the year 1894 that it had never been applied in England to goods, chattels or choses in action.[51] Since the law of *lis pendens* does not apply, where there is no title to the property sued for nor a lien on it, there can be no *lis pendens* where the contention is a mere demand for money, or in an action of trespass.[52] When personal property is already in the custody of the law, as when in replevin the defendant retains it under a redelivery bond, it is subject to the judgment finally rendered.[53]

Statutory Provisions.—In many States this matter has been regulated by statute, which provide that there shall be no *lis pendens* till a notice of the suit, specifying the parties, the property affected and the relief sought, has been filed in the office of the recorder of deeds of the proper district.[54] In such cases the delivery of the notice to the proper officer for record protects the complainant, though the officer fails to file it.[55] A failure to deliver such a notice to the proper officer will not protect a purchaser, who had notice of the litigation.[56] It is not necessary to file a notice of *lis pendens* in an action of ejectment, since in such action the plaintiff must recover on the legal title, and a *lis pendens* is only efficacious in protecting a purchaser without notice against equities.[57] When State laws have been passed requiring such notices to be filed in the office of the recorder of deeds in suits affecting the title to real estate, it has been held that such legislation does not affect the law of *lis pendens* as ap-

[36] Owen v. Kilpatrick, 96 Ala. 421.
[37] Williams v. Kerr, 113 N. C. 306.
[38] Collingwood v. Brown, 106 N. C. 362.
[39] McCutchen v. Miller, 31 Miss. 65.
[40] Jacobs v. Smith, 89 Mo. 673.
[41] Dodd v. Lee, 57 Mo. App. 167; McCutchen v. Miller, 31 Miss. 65; *Contra:* McClernand v. Phillips, 6 Colo. App. 47.
[42] McLaurine v. Monroe, 30 Mo. 462.
[43] Fletcher v. Ferrel, 9 Dana, 372; Bolling v. Carter, 9 Ala. 921.
[44] Winston v. Westfeldt, 22 Ala. 760.
[45] Carr v. Lewis C. Co., 15 Mo. App. 551; Union T. Co. v. Southern, etc. Co., 130 U. S. 565; Warren Co. v. Marcy, 97 U. S. 961; Winston v. Westfeldt, *supra*.
[46] Diamond v. Lawrence Co., 37 Pa. St. 353; Stone v. Elliott, 11 Ohio St. 252; Howe v. Hartness, 11 Ohio St. 449; Kellogg v. Fancher, 23 Wis. 1.
[47] Union T. Co. v. Southern, etc. Co., 130 U. S. 565; Warren Co. v. Marcy, 97 U. S. 961; *Contra:* Diamond v. Lawrence Co., 37 Pa. St. 353.
[48] Holbrook v. New Jersey, etc. Co., 48 N. Y. 616.
[49] Farmers', etc. Co. v. Toledo, etc. R. R., 54 Fed. Rep. 759.
[50] Carr v. Lewis C. Co., 15 Mo. App. 551; Union T. Co. v. Southern, etc. Co., 130 U. S. 565.
[51] Wigram v. Buckley, 63 L. J. Ch. 689.
[52] McCutchen v. Miller, 31 Miss. 65; Hailey v. Ano, 136 N. J. 569; Loudon v. Mullins, 52 Ill. App. 410; Crocker v. Lewis, 29 N. Y. Sup. 798.
[53] Sherburne v. Strawn, 52 Kans. 39.
[54] Smith v. Gale, 144 U. S. 509.
[55] Heim v. Ellis, 49 Mich. 241.
[56] Frank v. Jenkins, 11 Wash. 611.
[57] Sheridan v. Andrews, 49 N. Y. 478.

plied to a lawsuit relative to personal property, which law remains as it was before.[58]

Proceedings in United States Courts.—Since the laws of the States can have no authority over the federal courts, they can only become efficacious, in affecting their proceedings, or in determining the efficacy or effect of their judgments, by their adoption by federal legislation or by the rules of those courts. The State laws, requiring notices of the pendency of suits to be filed in certain offices in order to create a *lis pendens*, have not been so adopted, and therefore do not apply to proceedings in the federal courts.[59] For the same reasons the judgments of these courts do not cease to be liens, because they are not recorded as required by State laws.[60] A recent act of congress requires such judgments to be recorded as provided by State laws in order to continue to be liens on the defendant's property, where the State laws provide for the record of the judgments of the United States courts.[61]

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[58] Dodd v. Lee, 57 Mo. App. 167; Osborn v. Glasscock, 39 W. Va. 749; Leitch v. Wells, 48 N. Y. 585.

[59] McCloskey v. Barr, 48 Fed. Rep. 130; Majors v. Cowell, 51 Cal. 478; Rutherglen v. Wolf, 1 Hughes 78.

[60] U. S. v. Humphreys, 3 Hughes, 201; Skrew v. Jones, 2 McLean, 84; Doyle v. Wade, 23 Fla. 90; U. S. v. Holstead, 10 Wheat. 51; Stewart v. Wheeling, etc. R. R. (Ohio), 41 N. E. Rep. 247.

[61] Acts of Congress, 1887-88, p. 357.

LABORER'S LIEN—CHATTEL MORTGAGE—PRIORITIES.

BELL v. HINER.

Indiana Appellate Court, June 18, 1896.

Where the statute (Rev. St. 1894, sec. 7051) (Rev. St. 1881, sec. 5206), provides that when the property of any person engaged in business shall be seized, or the business suspended by the action of creditors, or put into the hands of any assignee, receiver, or trustee then the debt owing to the laborers (not exceeding $50 each), which have accrued within six months preceding the seizure shall be preferred debts, and shall be first paid in full, if sufficient, otherwise paid *pro rata* after paying costs. Held, that the statute creates a lien in favor of such laborers superior to the lien of a prior chattel mortgage, and attaches to the chattels though they are transferred by the employer to the mortgagee in payment of the debt.

GAVIN, J.: On Oct. 25th 1894, one Jasper was engaged in keeping a livery stable at Ft. Wayne. At this time and prior thereto, one Bell held a mortgage on the property used by Jasper in said business, viz: certain horses, carriages, etc., "and all other chattels belonging to the said Jasper in said barn," to secure $1,000, this being more than the value of the property. Jasper, being upon that day insolvent, threatened with suit, and pressed for payment by Bell, and unable to meet his liabilities, at his request, conveyed to Bell all of said property in payment of said debt; and his business was on said day and thenceforth continuously suspended by the actions of said Bell, who afterward sold the property to one Martin, who had knowledge of appellee's claim. Appellee was a laborer employed in the stable, to whom seven weeks' wages were due for work performed within that period last preceding the sale, and subsequent to the execution of the mortgage and the due recording thereof.

Section 7051, Rev. Stat. 1894, (sec. 5206, Rev. St. 1881), provides that when the property of any person engaged in business "shall be seized upon any mesne or final process of any court of this State, or where their business shall be suspended by the action of creditors or put into the hands of an assignee, receiver or trustee, then, in all such cases, the debts owing to laborers or employees, which have accrued by reason of their labor or employment, to an amount not exceeding fifty dollars to each employee, for work and labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts, and such laborers and employees shall be preferred creditors, and shall be first paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata*, after paying costs." Under this section, appellee sought to enforce a lien for $50, against the property in Martin's hands.

Appellants assert (1) that by the statute no lien is created nor any charge made against the property unless it shall come into the hands of some officer, assignee, or other trustee under the court, to be administered upon according to law; (2) that, even if a lien is created, it is junior to the lien of the mortgage. Under our authorities, neither position is tenable. The statute, it is true, does not in terms create any express lien *eo nomine;* but the supreme court, in Bass v. Doerman, 112 Ind. 390, 14 N. E. Rep. 377, decided that by this statute a lien was given to the laborer, superior to the rights of and enforcible against one to whom the property of the insolvent debtor was sold in payment of debts due the purchaser, where the business of the debtor was by such action of the creditor thereby suspended. The court's liberal construction of this statute has been approved in subsequent cases. Farmers' Loan & Trust Co. v. Canada etc. Ry. Co., 127 Ind. 250, 26 N. E. Rep. 784; Bank v. Black, 129 Ind. 595; Pendergrast v. Yandes, 124 Ind. 159. Counsel rely upon Wilkinson v. Patton (Pa. Sup.), 29 Atl. Rep. 293, as establishing a better and different doctrine. There is some difference in the statutes, by which the cases may perhaps be distinguished. In any event, however, we are satis-

fied to follow the adjudications of our own court. In State v. Aetna Ins. Co., 117 Ind. 251, it is said by Elliott, J., when considering the question of superiority of a statutory lien over a prior mortgage lien: "The statute must determine the character and extent of the lien. It is not necessary that it should, in express terms, declare that the lien shall be a paramount one, for, if the intention can be gathered from the general words and purpose of the statute the courts will give it effect." This is in harmony with the principle asserted by the Supreme Court of Massachusetts which says, in Dunklee v. Crane, 103 Mass. 470: "The statute contains no express provision that the lien shall attach and have priority over mortgages and other incumbrances created after the contract, but such is the necessary implication." See, also, Mayor *et al.* v. O'Neill, 32 N. J. Eq. 386.

It is true as urged by appellant's counsel, that the Bass case does not decide that the labor lien is superior to a prior mortgage, that question not being involved, but it does not decide the debt is a charge against the property in the hands of a purchaser for value. The word "lien" includes every case in which personal or real property is charged with the payment of a debt. Anderson Law Dict. 623. In Warren v. Sohn, 112 Ind. 213, it was claimed that mortgage liens were superior to subsequent minor's labor liens, although the statute declared that such labor liens should be paramount to and have priority over all other liens except taxes; yet the court decided that the statute must be given effect, and the mortgages yield to the labor liens. Here the statute directs that the labor claims shall be preferred, and shall be "first paid in full." It being established as it is by the Bass case, that the statute gives a lien for the labor claim, then it seems to us the intent that it shall be a paramount lien is clearly expressed. If it is to be "first" paid in full, we do not well see how the mortgage can come in before it. When the mortgagee accepted his mortgage, he must be deemed to have done so with knowledge that if the business was continued, and the contingency contemplated by the statute should occur, then the labor debts would be preferred, and must be first paid. The law entered into the mortgage contract as a silent, but potent. factor, and the mortgagee accepted it subject to such rights as might accrue to others under the law. Warren v. Sohn, *supra;* Farmers' Loan & Trust Co. v. Canada, etc., Ry. Co., 127 Ind. 264, 26 N. E. Rep. 784; Hancock v. Yaden, 121 Ind. 366, 23 N. E. Rep. 253. As said in some of the cases, it is wholly voluntary upon the part of the mortgagee whether he will accept a mortgage with the limitations by law incorporated therein. In Provident Inst. for Savings v. Jersey City, 113 U. S. 506, 5 Sup. Ct. Rep. 612, it was decided that a statutory lien for water rent was superior to mortgages executed prior to the attaching of the supply pipes to the mains. It is said: "When the complainant took its mortgages, it knew what the law was. It knew that by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law." To the same effect are Vreeland v. O'Neil, 36 N. J. Eq. 399, and Vreeland v. Mayor, etc., 37 N. J. Eq. 574. There the statute made the water rent assessment a "lien from the time of the confirmation thereof until paid, notwithstanding any devise, descent, alienation or other incumbrance thereon." This language was adjudged to make the water rent paramount to prior mortgages, although it was not so expressly declared in the statute. The principle upon which a mortgagee is subordinated to a statutory lien authorized and made superior by a statute in force when the mortgage is executed is not by any means new or novel. Nor does Indiana stand alone in thus providing security for the wage earners, who depend upon their daily toil for support. For many centuries, in admiralty, the rights of seamen to their wages have been held superior to the mortgagees of the vessel. The J. A. Brown, 2 Low. 464, Fed. Cas. No. 7,118; 2 Jones, Liens, § 1775. In Mississippi the liens of agricultural laborers are made superior to prior mortgages. Buck v. Payne, 52 Miss. 271; Buck v. Payne, 50 Miss. 648. In Michigan the wages of miners are given liens paramount to all others. McLaren v. Byrnes, 80 Mich. 275, 45 N. W. Rep. 143. In that State, as in ours no notice of lien need be given, but the court says: "All persons are bound to take notice that unpaid laborers for a mining corporation in the Upper Peninsula have a lien for their labor upon all the real and personal property of the corporation in that portion of the State." In Iowa we find the decisions exactly in harmony with our own. There is a statute similar to ours substantially, identical in terms so far as it relates to the matters herein involved. It does not in terms create a lien, nor declare it paramount to prior mortgages, but provides, as does ours, that the debts owing to laborers "shall be considered and treated as preferred debts, and such laborers or employees shall be preferred creditors and shall first be paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata* after paying costs." In Reynolds v. Black (Iowa), 58 N. W. Rep. 922, the question was presented as to whether, where the property had been taken by mortgagees, the laborers had any lien, and, if so, whether it was superior to the mortgagees. There, as here it was "contended that no lien is given to the laborer, that to give him preference over existing liens is to displace such liens, and that the preference only applies to what is left after satisfying existing liens;" but the court said, "to so construe this statute would largely defeat its manifest purpose," and adjudged that there was a lien superior to the mortgagees. The doctrine of this case was reaffirmed by St. Paul, etc. Co. v. Diagonal Coal Co. (Iowa), 64 N. W. Rep. 606.

We are not able to perceive that any general disaster will be brought upon the business interests of the community by our holding. The lien does not attach save in those cases where there has been a seizure by an officer, or a collapse of the business; and it is, under this statute, in the absence of fraud, limited to the property then belonging to the debtor, Thus, the ordinary everyday transfer and sale of property in the usual course of a going business will not be affected. The smallness of the amount also serves to lessen our apprehension as to the evil results to follow from the application to this case of the ordinary rules of law, and the giving effect to the plain letter of the statutes as to the order of precedence. A result which affords to the day laborer protection to the amount of $50 does not appear to us so highly inequitable as to call for any strained or fanciful construction of the statute. That he "shall be a preferred creditor, and shall first be paid in full," seems to us simple, plain English, easily understood, the meaning of which would not ordinarily be mistaken by the average man. Neither is the statute to receive a strict construction as being in derogation of the common law. It is remedial in its nature. As was said by the supreme court in speaking of a statute similar in character, and enacted for a similar purpose, viz: "to secure to employees of corporations an efficient remedy for the collection of money due them for wages. Such statutes are not only constitutional, but they are to be liberally construed, with a view of rendering effectual the purpose of the statute." In any event, the law is plain, and, if not wise, the remedy is by legislative repeal, rather than by judicial nullification. Assuming, without deciding, that the complaint must show a transfer of all the property used in the business, we are of opinion that this fact sufficiently appears. The averment, in substance, is that Bell, on Oct. 25, 1894, had a mortgage on all the chattels in the barn, and that this property was turned over to him. The answer of estoppel was clearly bad. It counted upon appellee's failure to make known his claim. Appellant's want of knowledge of its existence is nowhere alleged. This was essential to enable him to obtain the benefit of the appellee's silence as an estoppel. Roberts v. Abbott, 126 Ind. 83, 26 N. E. Rep. 565; Bank v. Williams, 126 Ind. 423, 26 N. E. Rep. 75. Earlier cases held that it was reversible error to sustain a defective demurrer to an answer, without reference to its sufficiency. Gordon v. Swift, 39 Ind. 212; Dugdale v. Culbertson, 7 Ind. 664. Later and better considered decisions, however, declare the law to be that although the demurrer be insufficient to test the pleading, and might be overruled without error, yet if it is in fact sustained, and the pleading is really bad, then no harmful error occurs. Wade v. Huber, 10 Ind. App. 417, 38 N. E. Rep. 351; Foster v. Dailey, 3 Ind. App. 530, 30 N. E. Rep. 4; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. Rep. 623; Board v. Gruver, 115 Ind. 224, 17 N. E. Rep. 290; Palmer v. Hayes, 112 Ind. 289, 13 N. E. Rep. 882; Hildebrand v. McCrum, 101 Ind. 61. We are unable to see that the degree of insufficiency or informality of the demurrer affects the application of the principle thus established.

It is argued that upon the principle, declared in Eversole v. Chase, 127 Ind. 297, 26 N. E. Rep. 835, section 7051, Rev. St. 1894, is not in force, because it was an amendment of a statute (section 5206, Rev. St. 1881) passed in 1879, which had been repealed by implication by the passage of the act of March 3, 1885 (Elliott's Supp., § 1598, being section 7058, Rev. St. 1894). "Repeals by implication are not favored in the construction of statutes," yet "it is ordinarily true that the enactment of a new statute covering the whole subject matter of an older statute, and containing provisions that cannot be reconciled with it, operates as an implied repeal of the older one. Robinson v. Rippey, 111 Ind. 112, 12 N. E. Rep. 141." This is the rule declared by this court, through Davis, J., in Allen v. Town of Salem, 10 Ind. App. 650, 38 N. E. Rep. 425. It was further said in the same case: "In order to effect such repeal by implication, it must appear that the subsequent statute revised the whole subject-matter of the former one, and was intended as a substitute for it, or that it was repugnant to the old law." The act of March 3, 1885, makes no provision for, and does not cover, the subject of labor liens where the property has not passed into the hands of an assignee or receiver, but is confined to those cases where it does come into the hands of an assignee or receiver. It falls far short of covering the whole subject matter of the act of 1879, nor is there any good reason why both should not stand together. Upon the principles of law announced in the Town of Salem Case, *supra*, and the authorities therein cited, we are of opinion that the act of March 3, 1885, did not repeal the law of 1879. Judgment affirmed.

NOTE.—A common-law lien is a right to retain possession of property belonging to another, until the claim of the party in possession, against the owner is satisfied. 2 Abbott's Law Dic. Such are the liens of workmen, on property upon which they have performed service; of pawn brokers, of innkeepers and of carriers upon property in their possession for charges. Story on Bailments, secs. 440, 303; Edwards on Bailments, sec. 420, 245 and 473. These and other liens at common-law, are inseparable from possession, and are lost if it is surrendered. An equitable lien may be defined to be a right not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. 2 Story, Eq. Jur. sec. 1215; Gladstone v. Berkley, 2 Meriv. 403. Such liens are based either upon express contract or the abstract principles of justice. They are upheld against all other interests except *bona fide* mortgages or vendees without notice. Story, Eq. Jur. sec. 1217. They are usually enforced when upon chattels, by a sale of the property to which they are attached. Equity begins where the law leaves off, and allows liens without reference to possession and are termed "equitable liens" and applicable to those liens which only exist

in equity. 2 Story, Eq. Jur. sec. 1215; Bis. Prin. Eq. sec. 351. Equitable liens are very frequently allowed upon the principle that equity looks upon that as done which ought to be done. Reed v. Gillian, 2 Desaus. Eq.(S.C.), 552. A lien is sometimes referred to as a pledge. But a pledge is not only a lien but also something more. It is a deposit by the debtor of personal property by way of security, with an implied power in the creditor to sell it upon default. In a lien, as in a pledge, the general property remains in the debtor, and the creditor had only a special property. A pledgee has such an interest in the thing pledged that he may transfer it to another, and he may enforce his security by sale without the aid of a court. A lien is neither a *jus ad rem* nor a *jus in re*. It is neither a right of property in the thing, nor a right of action for the thing. It is simply a right of detainer. Bruce v. Marlborough, 2 P. W. 491. In a legal sense a lien imports that a person is in possession of the property of another, and that he detains it as security for some demand which he has in respect of it. A lien therefore implies: 1. Possession by the creditor. 2. Title in debtor. 3. A debt arising out of the specific property. The case above depends upon the later division and is denominated a lien by statute. By recent legislation many of the liens recognized by the common-law, and many of those asserted in equity, have been materially enlarged in their scope, or made more effectual by provisions for their enforcement. Modern legislation has also in many instances gone beyond the liens previously recognized at law or in equity, and has created a great number of new liens, and it would seem that the Indiana statute had been extended to its full constitutional limit for the protection of all persons who labor for wages. A lien created by statute may be taken away or amended by a subsequent statute. Frost v. Ilsey, 54 Me. 345. An amendment seems to have been made to the Indiana statute for the benefit of a wage worker, notwithstanding such a lien is no part of the contract, but merely an incidental accompaniment of it, or means of enforcing it, a remedy given by law, and, like all matters pertaining to the remedy, and not to the essence of the contract, until vested rights or preferred claims are settled or prorated. A statutory lien, without possession, has the same operation and efficacy that a common-law lien has with possession. Beall v. White, 94 U. S. 382; Grant v. Whitwell, 9 Iowa, 152. Statutory liens are regulated by the law of the forum, and connot be claimed by virtue of the law of another State. Swasey v. Steamer Montgomery, 12 La. Ann. 800. A lien is either specific or general. The former attaches to specific property as security for some demand which the creditor has in respect to that property, such as work done or materials furnished in repairing or constructing that specific thing. Such a lien may be given by common-law or by statute. But a specific lien upon property cannot be enforced for the payment of other debts due claimant by the owner, at least without a special agreement to that effect. Nevan v. Romp, 8 Iowa, 207. A general lien is one arising not from some particular demand, but for a general balance of accounts. A general lien exists: First, where there is an express contract; second, where it is implied from the usage of trade; or third, from the manner of dealing between the parties in the particular case. Green v. Farmer, 4 Burr, 2214, 2221. Liens have always been favored by the courts. Lord Mansfield said: "The convenience of commerce and natural justice are on the side of liens. Green v. Farmer, *supra*. As between debtor and creditor the doctrine of lien is so equitable that it cannot be favored too much. Jacobs v. Latour, 5 Bing. 130.

Superiority of Liens.—It is not necessary that a statute shall, in express terms, declare that the lien shall be a paramount one. If it determines the character and extent of the lien, and the intention can be gathered from the language and purpose of the statute, courts will give it such effect. State v. Ins. Co., 117 Ind. 251. It is a necessary implication that such lien shall attach and have priority over mortgages and incumbrances created after the contract with a laborer, notwithstanding the statute contains no express provision thereon. Dunklee v. Crane, 103 Mass. 470. In Pennsylvania a different rule prevails. A statute providing that all moneys due for labor for any time not more than six months preceding the sale of the property, by execution or otherwise, on account of the insolvency or death of the employer, shall be a lien on such property, and first paid out of the proceeds of such sale, does not give a creditor for wages, a lien on personalty transferred in good faith by an insolvent employer in payment of his debts. The sale intended by the statute is a judicial sale. Wilkinson v. Patton, 162 Pa. 12. When one acquires a mortgage lien on property with knowledge of the use and purposes to which such property is put by its owner, and without notice that, under the statutory provisions giving persons employed in and about the property a prior lien on such property for labor, such property is liable to be subjected to after-acquired liens for labor and such labor liens will be paramount to and have priority over such mortgage liens. Warren *et al.* v. Sohn *et al.*, 112 Ind. 219. The lien of a mortgage on a railroad, given to a contractor before its construction, and assigned by him, is inferior to liens of laborers and material men for the subsequent construction of the road. Farmers' Loan & Trust Co. v. C. & St. L. Ry. Co., 127 Ind. 264, 26 N. E. Rep. 784. On the other hand a debt may be a preferred debt in a sense, and yet not be superior to another debt for which a lien is given, and so a creditor, may be a preferred creditor and still his claim may not be superior to that of lien, holders. The word "preferred" is a relative term. It necessarily refers to something else and means that the thing to which it is attached has some advantage over another thing of the same character, which but for such advantage would be like the other. State v. Cheraw & Chester Ry. Co., 16 S. C. 524. A preferred debt or claim which is not a lien is superior only to another preferred debt or claim of the same character, or that is not a lien. It is never superior to a lien, unless made so expressly by the terms of the law. A physician's bill for services in attending the decedent in his last sickness is a preferred claim or debt and the physician holding such claim is a preferred creditor; but it cannot be said that his claim is superior to that of a mortgage or other lien created in the life time of the decedent. The same is true of funeral expenses, of administration, etc. Such a claim is preferred simply to the general debts of the decedent, *i. e.*, to debts or claims that are not liens; and it becomes a charge upon the assets of the estate, and are preferred to such other debts or claims that are not liens, just as a claim of the character named in the opinion above, is a charge upon the assets of the insolvent, and is preferred to other debts not liens; hence, it does not become superior to those claims which are liens. Therefore, the Indiana statute in question, cannot by any process of reasoning be construed so as to make the claim of a laborer a lien superior and paramount to all other liens, of whatever character

and antiquity, that may exist against the insolvent property. To hold that the laborer, by virtue of this statute, has a lien for his wages superior to all other liens then or before then existing, is to inject into the statute language which is not there, and to enlarge, by construction, the scope of the rights conferred by this statute beyond that contemplated. If such a construction prevails, a class of liens will be created which was never intended, and which in the language of the Supreme Court of Pennsylvania, would be "of the most dangerous and noxious character. No one could purchase property without assuming the risk of insolvency of the vendor." Wilkinson v. Patton, 162 Pa. 12. Statutes which are in derogation of common or private rights, or which confer special privileges or impose special burdens or restrictions upon individuals, or upon any class of persons, which are not shared by others outside of such class, are to be strictly construed. Black Int. Law. 300. "To construe a statute so as to greatly restrict the rights and interest of lien holders other than the class established by this contruction, and to confer special privileges upon the class of persons coming within the provisions of the law thus construed, that cannot be enjoyed by others outside of such class, would be such an interpretation in favor of the class thus benefited, as to violate one of the cardinal rules of statutory construction," says Reinhard, J., dissenting. "And to say, as does the majority opinion, that the creation of such a preferred lien by mere construction affects only the remedy, and not any right, of the parties is incomprehensible." A lien given by statute is not a remedy, and to so characterize it would be a misapplication, as much as it would be to say a mortgage was but a remedy. Atkins v. Little, 17 Minn. 342. In the case of Bank v. Black, 129 Ind. 595, the general statement is made that such statutes should be liberally construed, but this is no authority for ejecting language into the statute which is not contained therein. In Bank v. Black, *supra*, it was simply held that the lien is extended to property of the corporation acquired and transferred by it the day before it went into the hands of a receiver, and after the performance of the labor for which the lien was asserted. It is claimed that this interpretation, while just and reasonable, falls far short of supporting a proposition that the mortgagee of a chattel mortgage executed in good faith and for a valid debt, or the assignee of such mortgage, may under the provisions of the statute quoted, be cut out and deprived of the benefits of the legally acquired mortgage lien by a claim originating nine months subsequent to the execution and the recording of such mortgage, and by mere silence, and without any legal steps being taken by which the intention to hold such a lien is declared and made a matter of public record, a charge may be fastened upon the mortgaged property superior and paramount to that of a chattel mortgage more than nine months old, in the absence of an express provision to that effect in the statute. Isolated expressions or *dicta* of judges cannot be used as authority for the establishment of a doctrine calculated to destroy security in a mortgage and other honestly acquired liens. That a statute may by its terms give the kind of preference claimed is not disputed, but it is insisted that the Indiana statute does not give it. If a lien is purely statutory, it exists and must be controlled by the statute. See Cook v. State, 101 Ind. 446; Hanch v. Ripley, 127 Ind. 151; Jones, Liens, Sec. 105. That the legislature has the power to enact such a law is not disputed but that the construction of the present statute can be made to cover such a case is disputed. If such a construction prevails there is not a chattel in Indiana upon which it would be safe to take a mortgage for purchase money or any other debt, for the owner and vendee may choose to put it into a use which wil bring it within the operation of this statute and any number of labor liens may attach to it. "Mortgaged property may readily be put to uses in the future of which, at the time the security was accepted, there was not the remotest indication nor prospect. Hence, to say that the lienholder must anticipate such extraordinary contingencies, is, as it appears to me," said Reinhard, J., "to strike down vested rights and securities, and to inaugurate a system by which creditors will be driven to resort to other means of securing themselves than those heretofore depended upon for their benefit in the commercial and business world. The construction placed upon the statute by the majority opinion is regarded by Reinhard, J., who dissents ,as exceedingly liberal and characterizes it as dangerous.

R. D. FISHER.

Indianapolis, Ind.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTIONS — Joinder of Causes — Party Plaintiff.— Under Code, § 267, subd. 1, allowing several causes of action to be united in the same complaint "when they arise out of the same transaction, or transactions connected with the same subject of action," causes of action against a sheriff and the surety on his official bond, for illegal levy and sale, and against the person who directed such levy and gave the sheriff an indemnifying bond, are properly joined. — STATE V. SMITH, N. Car., 25 S. E. Rep. 958.

2. ADMINISTRATION—Appointment of Administrator. —A grant of letters testamentary on proof that decedent owned property in the State, no matter when or how such chattels were brought into the State, was valid, though decedent, at the time of his death, was a resident of Alabama, and left assets there.—SHIELD V. UNION CENT. LIFE INS. CO., N. Car., 25 S. E. Rep. 951.

3. ADMINISTRATION — Rights of Widow. — A widow holding an execution against the administrator of her deceased husband for a year's support has the right to redeem land which the latter in his life-time had conveyed to another for the purpose of securing a debt; and, upon her so doing, may have the land sold under her execution, and take its proceeds in preference to a

judgment creditor of the intestate, whose judgment was obtained before the execution of the security deed.—COMMERCIAL BANK OF AUGUSTA v. BURCKHALTER, Ga., 25 S. E. Rep. 917.

4. ADVERSE POSSESSION — Parental Relation.—As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.—O'BOYLE v. MCHUGH, Minn., 69 N. W. Rep. 37.

5. APPEALS—Election of Remedies.—By Act March 3, 1891, a party seeking to appeal is not put to an election of remedies where a constitutional question arises, but has a right to raise such question by a resort to the supreme court, under the fifth section, and, while such appeal is pending, to avail itself of the defenses permissible under the sixth section by an appeal to the circuit court of appeals; but the latter court will continue the cause to await the decision of the supreme court.—PULLMAN'S PALACE-CAR CO. v. CENTRAL TRANSP. CO., U. S. C. C. of App., Third Circuit, 76 Fed. Rep. 401.

6. APPEAL — Mandamus. — *Mandamus* will issue to direct the execution of a judgment of the circuit court of appeals, notwithstanding a second appeal for matter arising previous to that judgment.—IN RE PIKE, U. S. C. C. of App., First Circuit, 76 Fed. Rep. 400.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A failure to comply with Pub. St. ch. 201, § 8, which requires a debtor, within 10 days after making an assignment, to file schedules of his creditors and of all his estate, does not invalidate the proceedings.—APPEAL OF HOWLAND, N. H., 35 Atl. Rep. 943.

8. ASSIGNMENT FOR BENEFIT OF CREDITORS. — An insolvent, after an assignment for the benefit of creditors, agreed with a creditor bank, if the latter would furnish the funds to pay off the claims of all other creditors who would agree to compromise, the assigned property should be transferred to such bank for the payment of its claim and the amount so advanced, in full. Over 90 per cent. of the claims were thus compromised, and the bank, after paying the amount advanced and its own claim in full, reconveyed the property to the insolvent: Held, that such reconveyance was a fraud on the rights of a creditor not accepting the compromise, rendering the bank liable for the amount of its claim to the extent of the property so transferred,—AMERICAN EXCHANGE NAT. BANK v. WALKER, Ill., 45 N. E. Rep. 271.

9. ATTACHMENT — Property Subject.—Property in the hands of the sheriff, under a mandate in claim and delivery, which requires him to take the property and deliver it to plaintiff, is not subject to attachment.—WILLIAMSON v. NEALY, N. Car., 25 S. E. Rep. 953.

10. ATTORNEY AND CLIENT — Ratification. — A client may ratify the act of his attorney in commencing suit, so as to prevent a dismissal for want of original authority on the part of the attorney.—ROBERTS v. DENVER, L. & G. R. Co., Colo., 46 Pac. Rep. 880.

11. BANKS AND BANKING — Collections—Insolvency.—When an instrument is intrusted to a bank for collection, the bank secures no title thereto, and no right to hold it in any other capacity than as agent.—NATIONAL BANK OF COMMERCE OF SEATTLE v. JOHNSON, N. Dak., 69 N. W. Rep. 49.

12. BANKS AND BANKING — Officers — Fraudulent Receipt of Deposits. — Const. Wash. art. 12, § 12, making individually liable an officer of a bank receiving deposits after he has knowledge of the bank's insolvency, is self-executing. — MALLON v. HYDE, U. S. C. C. (Wash.), E. D., 76 Fed. Rep. 388.

13. BENEVOLENT SOCIETY — Membership Certificate—Beneficiary.—Where a member of a mutual benefit association makes a proper change in the beneficiary of his membership certificate, and duly notifies the association, the failure of the directors to consent to the change, and to record it as required by the by-laws, because no meeting occurred between the notice and the member's death, cannot defeat the beneficiary's rights.—SANBORN v. BLACK, N. H., 35 Atl. Rep. 942.

14. CARRIERS—Injuries to Passenger on Street Car.—The concurrent facts of the happening of an accident to a passenger on a street car and the exercise by the passenger of ordinary care do not raise a presumption of negligence against the carrier, so as to shift the burden of proof on it to show that it was not guilty of negligence, where plaintiff's evidence shows that the accident was due to a wagon driven so close to an open car as to strike plaintiff's foot. — CHICAGO CITY RY. CO. v. ROOD, Ill., 45 N. E. Rep. 288.

15. COMPROMISE. — The compromise of a doubtful claim is a sufficient consideration to support a promissory note fairly given in settlement of the controversy compromised. — JOHNSON v. REDWINE, Ga., 25 S. E. Rep. 924.

16. COMPROMISE — Consideration. — Mutual concessions for the prevention of litigation are a valid consideration for a compromise settlement between the heirs and the legatees of a decedent. — MCDOLE v. KINGSLEY, Ill., 45 N. E. Rep. 281.

17. CONSTITUTIONAL LAW—Election and Voters.—The act of April 17, 1896 (92 Ohio Laws, p. 185), which prohibits the name of any candidate for office from being placed upon the official ballot more than once, is a valid law.—STATE v. BODE, Ohio, 45 N. E. Rep. 195.

18. CONSTITUTIONAL LAW — Taxation — Situs of Railroad Rolling Stock.—It is no objection to the imposition of a State tax upon railroad rolling stock used partly within the State that the same is engaged as a vehicle of interstate commerce, or that its legal *situs* is in another State or territory, where taxes on it have been paid.—REINHART v. MCDONALD, U. S. C. C., N. D., (Cal.), 76 Fed. Rep. 403.

19. CONTEMPT OF COURT—Power to Punish.—The general assembly is without authority to abridge the power of a court created by the constitution to punish contempts summarily, such power being inherent, and necessary to the exercise of judicial functions; and sections 6906, 6907, Rev. St., will not be so construed as to impute to the general assembly an intention to abridge such power.—HALE v. STATE, Ohio, 45 N. E. Rep. 199.

20. CONTRACT—Public Policy. — A contract between a board of trade and a person who represents himself as having control over certain industries which he is about to establish in another town, whereby such person agrees to withdraw from that deal, and use his influence to have those industries established in the town represented by said board, is not against public policy.—LORD v. BOARD OF TRADE OF WICHITA, Ill., 45 N. E. Rep. 205.

21. CONTRACT—Rescission—False Representations.—Representations that a saloon is first-class in every respect, and well fitted up, and that the business will yield a profit of $4,000 in two years, though false, will not entitle the purchaser to rescind the sale for fraud.—O'DONNELL & DUER BAVARIAN BREWING CO. v. FARRAR, Ill., 45 N. E. Rep. 288.

22. CONTRACTS—Rescission—Fraudulent Representations.—A party cannot avoid a contract for false representations made by the other party, which his own testimony shows he did not rely upon, nor act upon, in making the contract.—DADY v. CONDIT, Ill., 45 N. E. Rep. 224.

23. CONVERSION—Ownership of Crops.—The owner of real estate is presumed, *prima facie*, to own its products, including annual crops. Such presumption, however, is not conclusive and may be rebutted by evidence.—ELSTAD v. NORTHWESTERN ELEVATOR CO., N. Dak., 69 N. W. Rep. 44.

24. CORPORATIONS — Foreign Corporations — Surety Bonds.—A surety bond taken as security for the conduct of an agent of a foreign corporation which under

takes to do business in Pennsylvania without complying with the requirement of the second section of act April 22, 1874, that a statement showing the title and object of the corporation, the location of its officers, and names of its agents, etc., shall be filed in the office of the secretary of the commonwealth, is invalid.—MCCANNA & FRASER CO. v. CITIZENS' TRUST & SURETY CO. OF PHILADELPHIA, U. S. C. C. of App., Third Circuit, 76 Fed. Rep. 420.

25. CORPORATION—Foreign Stock Corporations—Certificate.—The act of May 19, 1894 (91 Ohio Laws, pp. 355, 356), which provides "that no foreign stock corporation, other than a banking and insurance corporation, shall do business in this State without first having procured from the secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in the State," etc., and that no such "corporation doing business in this State without such certificate shall maintain any action in this State upon any contract made by it in this State until it shall have procured such certificate," etc., does not apply to a foreign corporation whose business within the State consists merely of selling through traveling agents, and delivering goods manufactured outside of the State.—TOLEDO COMMERCIAL CO. v. GLEN MANUFG. CO., Ohio, 45 N. E. Rep. 197.

26. CORPORATIONS — Insolvency—Fraudulent Conveyances.—A corporation is not insolvent, so as to render a mortgage of its property fraudulent, so long as it has property on hand, which, if converted into money at market prices, would be sufficient to meet liabilities.—SILVER VALLEY MIN. CO. v. NORTH CAROLINA SMELTING CO., N. Car., 25 S. E. Rep. 954.

27. CORPORATIONS—Officers.—One who seeks to hold a corporation liable on its general manager's guaranty of a third person's note must show special authority on the part of such officer to make the guaranty.—DOBSON v. MOORE, Ill., 45 N. E. Rep. 248.

28. CORPORATIONS — Receivers' Certificates—Priority of Liens.—In the case of an insolvent private corporation the court will not order receivers' certificates to be issued for the purpose of raising money to pay interest on the bonds of the company, thus displacing existing liens.—NEWSON v. EAGLE & PHOENIX MANUF'G CO., U. S. C. C., N. D. (Ga.), 76 Fed. Rep. 418.

29. CRIMINAL EVIDENCE—Homicide—Res Gestæ.—Deceased was shot and mortally wounded by a police officer while attempting to escape from arrest. After being wounded, and while still lying in the street, the deceased, in the presence of the defendant, said: "I am dying. I did no wrong:" Held, that the declaration was admissible as part of the *res gestæ*.—MORAN v. PEOPLE, Ill., 45 N. E. Rep. 230.

30. CRIMINAL LAW—Confessions.—Whether or not admissions made by a person accused of crime relate to independent facts, proof of which would be admissible as circumstances tending to establish the hypothesis of guilt, or of themselves amount to an indirect confession of guilt, is a question of fact for the jury; and the court, having in effect so instructed them, did not, in either view of the matter, err in submitting for their consideration the weight of such admissions.—BRYANT v. STATE, Ga., 25 S. E Rep. 927.

31. CRIMINAL LAW — Examining Magistrate. — The powers and jurisdiction of the officials designated by Pen. Code, §§ 807, 808, as magistrates, while acting as such, are not derived from the statutes relating to their several offices, but from such sections and from Const. art. 1, § 8, authorizing the prosecution of indictable offenses by information after examination and commitment by a magistrate; and a police judge in a city, being *ex officio* a magistrate, possesses jurisdiction to conduct such examinations, without regard to whether or not it is, in terms, conferred by the statute creating his office.—PEOPLE v. CRESPI, Cal., 46 Pac. Rep. 683.

32. CRIMINAL LAW—Instructions—Reasonable Doubt.—While, in charging a jury trying a criminal case as to the sources from which they should arrive at the truth, the judge may appropriately refer both to the sworn evidence and the statement of the accused, yet, where the statement suggests no theory favorable to the accused which is in conflict with or explanatory of the evidence, an instruction that, in determining the guilt or innocence of the accused, the jury are to look to the evidence submitted to them, is manifestly not cause for a new trial.—BURNEY v. STATE, Ga., 25 S. E. Rep. 911.

33. CRIMINAL LAW—Larceny—Stealing of Note.—Under the provision of Code 1892, § 1176, that "if any person shall steal any note, the money due thereon shall be deemed the value of the article stolen, without proof thereof," a defendant shown to have stolen notes cannot be permitted to show the insolvency of the makers and their refusal to pay the notes as a defense, or to reduce the value of the property stolen.—MCDOWELL v. STATE, Miss., 20 South. Rep. 864.

34. DAMAGES—Breach of Contract.—In an action for corn delivered by the plaintiff to defendants, it appeared that plaintiff left it with defendants under an agreement that whenever he desired to sell he should receive five cents less than the price in the Chicago market at that date; that when plaintiff determined to sell, the market reports for that particular day were not received by defendants; that plaintiff referred to a morning paper, giving the quotations for the closing market of the evening before, and that the prices given by such paper were reliable authority: Held, that it was not error to permit the jury to use such price as a basis in the computation of plaintiff's damages.—NASH v. CLASSON, Ill., 45 N. E. Rep. 277.

35. DEEDS—Execution.—A deed purported to have been signed by 20 grantors, the last signature being that of H C H. The signatures of two witnesses, one of whom was the notary taking the acknowledgment of H C H, appeared, the one beneath the other, inclosed in brackets, and between them and the signature of H C H were the words "Attest as to," so as to read, together with the signature, "Attest as to H C H." There were acknowledgments by other grantors before notaries in other States, but there were no other subscribing witnesses: Held, that the restricted character of the attestation was conclusive, and excluded any presumption that the deed was duly witnessed as to all the grantors, as required by Rev. St. § 2216, and entitled to be recorded.—HARASS v. EDWARDS, Wis., 69 N. W. Rep. 69.

36. DOWER—Lease.—A widow cannot lease her dower interest before it has been assigned to her.—UNION BREWING CO. v. MEIR, Ill., 45 N. E. Rep. 264.

37. DRAINAGE — Discretionary Power.—The commissioners of a drainage district, being vested by the statute with a discretion as to the location and manner of construction of drains, are not bound by the plans and estimates of the engineer, and a change in such plans does not vitiate an assessment, as their discretion cannot be controlled by the courts.—SISSON v. DRAINAGE COMR'S OF DIST. NO. 1, Ill., 45 N. E. Rep. 215.

38. ELECTION—Removal of County Seat.—The county being an indispensable party to a bill to contest an election for removal of the county seat, the bill will be dismissed on failure to make the county a party within the time within which contests of elections are required to be filed.—VILLAGE OF METAMORA v. VILLAGE OF EUREKA, Ill., 45 N. E. Rep. 209.

39. EQUITY—Legal Relief.—Complainant filed a bill for specific performance of covenants in a lease whereby, it was alleged, respondents became bound to restore part of the leased land, which was washed away by a flood in the Mississippi river. In lieu of specific performance the bill prayed for damages for breach of the covenant, and also for a decree for installments of rent due: Held that, though specific performance was refused, there was such a showing of equitable cognizance that the cause should be retained for the purpose of affording other relief, even purely legal in

character, if justified by the proofs.—WAITE v. O'NEIL, U. S. C. C. of App., Sixth Circuit, 76 Fed. Rep. 408.

40. ESTOPPEL IN PAIS.—One who contracted with a waterworks company, through persons interested in it, and professing to represent it, and by virtue of such contract and a lease to him by such persons got possession of the waterworks property, and held it until the lease expired, was estopped from denying that the waterworks company was properly incorporated and officered, and that it was the owner of the property leased.—FAYETTEVILLE WATERWORKS CO v. TILLINGHAST, N. Car., 25 S. E. Rep. 960.

41. EVIDENCE—Expert Testimony.—In an action by one employed to take care of defendant's daughter while sick, to recover damages on the ground that the daughter was ill of typhoid fever, that defendant concealed such fact, and that plaintiff contracted such disease, it was not error to permit medical experts called by plaintiff to answer hypothetical questions purporting to state the facts testified to by plaintiff, and inquiring on such facts and on all of plaintiff's testimony when and where, in their opinion, plaintiff contracted the disease, where all of such experts, except two or three, testified that they had heard all of plaintiff's testimony, and the others stated that they had heard all but a portion of the re-cross-examination, which appeared to develop nothing of importance.—KLIEGEL v. AITKEN, Wis., 69 N. W. Rep. 67.

42. EVIDENCE—Proof of Handwriting.—Under Hill's ANN. LAWS, § 765, providing that evidence as to handwriting may be given by a comparison by a skilled witness, or by the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, it is competent for a party to introduce letters admitted to be in the handwriting of the adverse party, but not bearing on the controversy in issue, for the purpose of showing, by a comparison of handwriting, that a material letter was written by such adverse party.—MUNKERS v. FARMERS' & MERCHANTS' INS. CO., Oreg., 46 Pac. Rep. 850.

43. EVIDENCE—Statements by Third Persons.—In an action by an attorney to recover fees, conversations between defendant and an other attorney, who was associated with plaintiff in the case in which the services were rendered, are inadmissible against plaintiff, such conversations having taken place in the absence of and without the knowledge of plaintiff.—CHAPMAN v. NEARY, Cal., 46 Pac. Rep. 867.

44. FEDERAL COURTS—Citizenship.—Allegations that defendant has left the United States, and become permanently domiciled in the Dominion of Canada, and now resides there, and intends to become a naturalized citizen of that country, does not show his alienage for the purpose of conferring jurisdiction on the federal court.—BISHOP v. AVERILL, U. S. C. C., E. D. (Wash.), 76 Fed. Rep. 886.

45. FEDERAL COURTS — State Taxation of National Bank Stock.—A federal court has jurisdiction of a suit to enjoin State taxing officers from enforcing collection of a tax upon shares of stock in a national bank, where the protection sought is based upon the ground that the State statutes under which such officers are proceeding in making their assessment is in violation of the fourteenth amendment to the constitution, and of Rev. St. § 5219.—THIRD NAT. BANK OF PITTSBURG v. MYLIN, U. S. C. C., E. D. (Penn.), 76 Fed. Rep. 885.

46. FRAUD — False Representations.—Defendants solicited complainants to join with them in the purchase of a tract of land, representing that the price of the land was $14,000, to which each should contribute an equal share. In fact, the purchase price was only $10,500, and by means of the false representations complainants were induced to and did pay more than their share: Held, that the transaction was a fraud on the part of the defendants, for which they were liable to the extent of the excess so paid.—BUNN v. SCHNELLBACHER, Ill., 45 N. E. Rep. 227.

47. GARNISHMENT—Proceeds of Exempt Personalty.—The proceeds of a sale of exempt personal property, designed for reinvestment in other exempt personalty, to take the place of that sold, are not subject to garnishment in the hands of the purchaser.—CULLEN v. HARRIS, Mich., 69 N. W. Rep. 78.

48. HOMESTEAD — Sale under Execution.—Where premises occupied as a homestead are levied on under an execution against a judgment debtor, and the sheriff does not appraise and set off the homestead, as required by Rev. St. ch. 52, §§ 1, 10, a sale for an inadequate price will be set aside, on the petition of the debtor, where the amount for which the premises were sold, with interest, is deposited in court for the benefit of the purchaser.—BACH v. MAY, Ill., 45 N. E. Rep. 248.

49. HOMESTEAD — What Constitutes.—Testator bequeathed his homestead to his wife for life, directing that the remainder of his property be divided between his wife and children. The testator owned a part of a block, which had been divided into sublots, but without streets or alleys. On one corner of the block was a house, with outhouses and well, rented by testator for business purposes. On the other corner was a dwelling house occupied by testator and his family, with outhouses. The family used the well appurtenant to the other house: Held, that the term "homestead," as used in the will, must be construed as including only that portion of the block occupied exclusively by the dwelling house and its appurtenances.—SMITH v. DENNIS, Ill., 45 N. E. Rep. 267.

50. HUSBAND AND WIFE—Action on Note.—Code, art. 45, § 2, declaring that a married woman may be sued jointly with her husband on any note, bill, contract, or agreement which she may have executed jointly with him, includes only contracts wholly reduced to writing, and signed by both husband and wife.—HARVARD PUB. CO. OF NEW YORK v. BENJAMIN, Md., 35 Atl. Rep. 930.

51. INSOLVENCY — Insolvent Estate—Fees of Attorneys.—The fees of attorneys employed by certain creditors of an insolvent estate cannot be made a charge upon the fund for distribution, though it was made available by their professional services, and the non employing creditors were all incidentally benefited.—EIVES v. PATTY, Miss., 20 South. Rep. 862.

52. INSOLVENT LESSEE — Receiver.—A receiver was appointed for an insolvent corporation having the concession of an allotted space within exposition grounds for restaurant purposes in consideration of a percentage of its gross receipts. Half of the term remained, and the concession was of itself the principal thing of value to the creditors. Under an order of the court, the creditors consenting, the receiver conducted the business which the insolvent had been unable to continue. There was no act of disaffirmance, or notice that the receiver would not be bound by the contract of concession. He completed the term, and received the profits: Held, that he could not repudiate the contract at the end of the term, and pay the exposition company on the basis of a *quantum meruit* only.—SPENCER v. WORLD'S COLUMBIAN EXPOSITION, Ill., 45 N. E. Rep. 250.

53. INSURANCE — Conditions of Policy.—It is the settled law of the State that, under provisions in an insurance policy that it shall be void in case of a change made in the property increasing the hazard, if such changes are made but the policy has not been declared forfeited, and the changed conditions cease to exist, leaving the risk no more hazardous than before, the policy again becomes in force.—TRADERS' INS. CO. v. CATLIN, Ill., 45 N. E. Rep. 255.

54. INTERPLEADER.—A bill to require defendants to interplead with each other in reference to certain property must show that all the adverse titles or claims are dependent or derived from a common source.—KYLE v. MARY LEE COAL & RAILWAY CO., Ala., 20 South. Rep. 851.

55. INTOXICATING LIQUORS—Illegal Sale.—This being an indictment for a misdemeanor against two persons,

upon which they were jointly tried and convicted, and the only question for review by this court being whether or not the verdict was contrary to the evidence, and it appearing that there was sufficient evidence to support the conviction of one of the accused, but not that of the other, the judgment as to the former is affirmed, and as to the latter reversed.—COOK v. STATE, Ga., 25 S. E. Rep. 919.

56. JUDGMENT—Conclusiveness—Infancy.—An infant who sues by his next friend is as much bound by the judgment of a court having jurisdiction of the parties and subject-matter as if of full age.—KANSAS CITY, FT. S. & M. R. CO. v. MORGAN, U. S. C. C. of App., Sixth Circuit, 76 Fed. Rep. 429.

57. JUDGMENT—Enforcement—Equitable Relief.—In a suit in equity in aid of a social execution issued on a judgment rendered in attachment, where it alleged by a cross bill, and admitted by demurrer, that the judgment therein was recovered on a fictitious demand, by the fraud of plaintiff, in the absence of defendant, and without his knowledge, and on constructive service merely, equity will interfere to prevent the enforcement of the judgment.—SCHROER v. PETTIBONE, Ill., 45 N. E. Rep. 207.

58. LIBEL — Privileged Communications.—A person who, as agent of another, swears to the truth of a petition, to obtain an attachment as for a contempt because of an alleged violation of an injunction, is so far a witness in such proceeding as that affidavits, filed by the defendant in support of his answer, tending, by proof of bad character, to impeach the credit of such agent, are privileged, and matters therein recited pertinent to that point are not libelous, and cannot be made the basis of an action for libel, either as against an attorney offering such affidavits in evidence, the defendant, or the witnesses making such affidavits.—CONLEY v. KEY, Ga., 25 S. E. Rep. 914.

59. LIS PENDENS — Purchase Pendente Lite—Certificate.—The purchaser of a tax certificate, pending a suit, to which his vendor is a party, to annul the certificate, is bound by the judgment, though no *lis pendens* was filed. Rev. St. § 3187, providing for filing a *lis pendens*, applies only to the cases therein provided for.—BROWN v. COHN, Wis., 69 N. W. Rep. 71.

60. MANDAMUS—Duty of Drainage Commissioners.—Laws 1885, p. 83, § 17, providing that on the organization of a drainage district the commissioners shall determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district; and section 41, declaring that, if the commissioners find the lands are not drained as contemplated, they shall use the corporate funds to carry out the original purpose,—are mandatory; and a person who receives no benefits from the improvement, by reason of an error in constructing the drain, may compel the commissioners, by *mandamus*, to alter such drain so as to properly carry off the water from his land.—PEOTONE & MANTENO UNION DRAINAGE DIST. NO. 1 v. ADAMS, Ill., 45 N. E. Rep. 266.

61. MARRIED WOMAN—Partnership with Husband.—There is no law or public policy in this State which forbids a married woman from engaging in business with her husband as a copartner; and where a partnership between them is formed, and she is held out to the world as one of its members, she becomes liable to one who deals with the firm upon the faith of her membership therein.—BURNEY v. SAVANNAH GROCERY CO., Ga., 25 S. E. Rep. 915.

62. MASTER AND SERVANT — Assumed Risk.—An employee working in a place lighted by an electric lamp, which, as he knew, had been out of repair and the light intermittent for several months, during which he continued to work without objection or promise of remedy, assumed the risk of injury incident to the defective light, though he was told on the particular night when he was injured, by another employee in charge of the lights, that they were all right; it not appearing that such employee was authorized or assumed to speak for the employer, or that the light had been repaired.—COLORADO FUEL & IRON CO. v. CUMMINGS, Colo., 46 Pac. Rep. 875.

63. MASTER AND SERVANT—Contributory Negligence.—A workman who voluntarily goes to work on a scaffold which he knows to be unsafe cannot recover for injuries caused by its fall.—NUSS v. RAFSNYDER, Penn., 35 Atl. Rep. 968.

64. MASTER AND SERVANT—Defective Machinery—Assumption of Risk.—In an action by a servant against his master for injuries from defective appliances, a complaint alleging knowledge both on the part of the servant and the master as to the existence of the defect, and a promise on the part of the master to remedy the same is demurrable, where it fails to show that the master, after such knowledge and promise, had a reasonable time before the accident to remedy the defect.—BURNS v. WINDFALL MANUF. CO., Ind., 45 N. E. Rep. 189.

65. MASTER AND SERVANT — Negligence of Master.—A guy rod supporting a crane ran through a brick wall into a cast-iron plate extending down from the top of the wall. The plate through which the rod ran cracked in the center, in sound iron, letting the rod through the wall, and causing the crane to fall and injure plaintiff. There was evidence that long before the accident the wall had bulged where the rod went through, and that the bulging was visible, and that timbers had been put up to strengthen it: Held, that the question of defendant's negligence was properly submitted to the jury.—ASHLEY WIRE CO. v. MERCIER, Ill., 45 N. E. Rep. 222.

66. MASTER AND SERVANT — Railroad Companies—Relief Associations.—In an action against a railroad company by one of its employees to recover damages for personal injury through negligence, a plea that the employee had accepted benefits as a member of a relief association organized by the company, under agreement that he thereby relinquished his right of action, does not constitute a good defense when the plea fails to show that, if the association was at any time short of funds to meet its obligations to a member, such member could maintain an action against the company, or fails to set out the arrangement between the company and its employee with such fullness and certainty that the court may be able to see that the arrangement is fair and reasonable, and not against public policy, nor voidable for want of valuable consideration.—CHICAGO, R. & Q. R. CO. v. MILLER, U. S. C. C. of App., Eighth Circuit, 76 Fed. Rep. 439.

67. MASTER AND SERVANT — Vice-principal — Negligence.—A servant directed to take other servants, to be selected by him, and unload heavy machinery from a dray by means of a crane, may act in such work as a vice-principal, though he has no authority to discharge the servants under him.—FRASER & CHALMERS v. SCHROEDER, Ill., 45 N. E. Rep. 288.

68. MORTGAGES — Foreclosure.—A purchaser at a foreclosure sale acquires only the title of the mortgagor, as against a cotenant of the mortgagor, though the mortgage assumes to convey the entire fee.—MCMAHILL v. TORRENCE, Ill., 45 N. E. Rep. 269.

69. MORTGAGE—Foreclosure.—A second lienholder is not entitled to a reversal of a decree foreclosing the first mortgage because it includes excessive interest, or other erroneous items, where the property has been sold, leaving a deficiency on the first mortgage debt greater than the amount of such items.—PRIMLEY v. SHIRK, Ill., 45 N. E. Rep. 247.

70. MORTGAGE—Innocent Purchasers—Notice.—That a mortgage is taken as security for a pre-existing debt does not prevent the mortgagee being an innocent purchaser, he having, at the time of taking it, released other security, and extended time of payment.—ALSTON v. MARSHALL, Ala., 20 South. Rep. 850.

71. MORTGAGES — Trustee's Sale of Personalty.—By a sale under a trust deed which embraces both real and

personal property the title to the personal property passes to the purchasers without a written transfer, and a bill of sale made subsequently by the mortgagor is a nullity.—GARNETT v. CHAPMAN, Miss., 20 South. Rep. 863.

72. MUNICIPAL CORPORATIONS — City Council—Rules. — A rule of a city council provided that, when a question should have been indefinitely postponed, the same subject should not be acted on again, or considered, during the session: Held, that such rule prevented further action on a subject or scheme which was substantially the same as that contained in an ordinance indefinitely postponed.—ZEILER v. CENTRAL RY. CO., Md., 35 Atl. Rep. 982.

73. MUNICIPAL CORPORATIONS—Intoxicating Liquors —Effect of Annexation.—It is within the power of the legislature to provide that, where any incorporated town, village, or city is annexed to another town, village, or city, any ordinance in force in the town, village, or city, etc., annexed at the time of the annexation, prohibiting or regulating the licensing of dramshops within the territory so annexed, shall be continued in force.—SWIFT v. KLEIN, Ill., 45 N. E. Rep. 219.

74. MUNICIPAL CORPORATIONS—Local Improvements —Laying Water Mains.—An ordinance authorizing the construction of a system of waterworks by a city provided that so much of the improvement as related to the laying of water mains and the appurtenances thereto, but not including hydrants, reservoir, or pumping station, should be paid for by special assessment: Held, that the improvement contemplated was a local improvement, within the statute allowing special assessments for local improvements.—HUGHES v. CITY OF MOMENCE, Ill., 45 N. E. Rep. 300.

75. MUNICIPAL CORPORATIONS — Ordinance.—A city ordinance providing that no person shall allow or permit any indecent, loud, or boisterous noise, or any fighting or other disturbance, in or about his house or tavern, inn, saloon, cellar, shop, office, or other residence or place of business, or permit drunkards or persons having the reputation or name of being prostitutes to congregate, visit, or remain therein, is unreasonable, as not limited in its application to such assemblages or to such places of business as are properly within police control, and consequently void.—CITY OF GRAND RAPIDS v. NEWTON, Mich., 69 N. W. Rep. 84.

76. MUNICIPAL CORPORATION—Public Improvements. —A city expressly authorized to levy and collect a general tax for the construction of waterworks cannot make a special assessment to pay for the standpipe, reservoir, and pumping apparatus, since these do not constitute a "local improvement," for which alone a special assessment is proper.—HUGHES v. CITY OF MOMENCE, Ill., 45 N. E. Rep. 302.

77. MUNICIPAL CORPORATIONS—Public Improvements —Assessments.—Act June 21, 1895 (Laws 1895, p. 100), amending Act April 10, 1872, and granting a trial by jury, in proceedings for confirmation of an assessment, to determine whether the assessment for a city improvement was excessive or not, applies to proceedings pending at the time the act went into effect. —ILLINOIS CENT. R. CO. v. CITY OF WENONA, Ill., 45 N. E. Rep. 265.

78. NEGLIGENCE — Contributory Negligence.—Where the defendant pleaded that plaintiff's intestate was guilty of contributory negligence in standing where he did at the time of the accident, and one witness testified that deceased was not standing in a proper place, while another testified that he was standing just where he should stand, under the requirements of his duties, held, that the evidence did not warrant a nonsuit on the ground of contributory negligence.—MCALPINE v. LAYDON, Cal., 46 Pac. Rep. 865.

79. NEGLIGENCE—Icy Sidewalks — Contributory Negligence.—In a suit for injuries resulting from a fall caused by slipping on an icy sidewalk, the fact that plaintiff saw the ice, and attempted to cross, does not prove such contributory negligence as warrants the withdrawal of the case from the jury.—MANROSS v. OIL CITY, Penn., 35 Atl. Rep. 959.

80. NEGOTIABLE INSTRUMENT — Action on Note.— Where, in an action by a firm to recover on a note made by defendants to a third person or order, and by him indorsed to plaintiffs, defendants plead that the note was procured by fraud, of which plaintiffs had knowledge at the time of the indorsement, the testimony of one partner "that the firm was not aware of any fraud" is inadmissible, since he can only testify as to his own want of knowledge.—MCCOSKER v. BANKS, Md., 35 Atl. Rep. 935.

81. NEGOTIABLE INSTRUMENT — Action on Note— Duress.—As a general rule, a promissory note, executed under the duress of the principal by legal imprisonment, is not void as to a surety thereon, if the latter, being under no duress, and knowing of the duress of the principal, nevertheless voluntarily signed the note; and, though knowledge of the fact of the principal's imprisonment does not necessarily involve knowledge on the part of the surety of its want of legality, a plea by the latter, alleging that the principal signed under duress of imprisonment, even if in other respects good, ought to allege that the imprisonment was illegal, or, if legal, was used for an illegal purpose, and that the surety was ignorant as to its real character, and therefore ignorant of the duress.—GRAHAM v. MARKS, Ga., 25 S. E. Rep. 931.

82. NEGOTIABLE INSTRUMENT — Action on Note—Assignment.—Where the principal of a promissory note was made payable a given number of years after its date, with a stipulation in the note for the payment of the interest annually, the contract to pay interest was severable from that to pay the principal, and a suit for interest past due could be maintained without regard to the time when the note matured as to principal. This being so, it follows that the payee of such a note could lawfully, in writing, assign to another the principal thereof, and reserve to himself the interest, with the right to collect the same.—SCOTT v. LIDDELL, Ga., 25 S. E. Rep. 935.

83. OFFICERS — De Facto Officers — A *de facto* board cannot create a *de jure* officer. — MAYOR, ETC., of JERSEY CITY v. ERWIN, N. J., 35 Atl. Rep. 948.

84. PRINCIPAL AND AGENT—Instructions—Liability of Agent.—Complainant was agent of an insurance company, under instructions to report all matters to the company for approval. The company notified him of its intention to go into liquidation, instructing him to let the business in force stand, as it would soon be reinsured. In violation of these instructions, complainant called in and canceled all policies issued by him, repaying the premiums *pro rata:* Held, that he was not entitled to recover the amount so paid on policies canceled on his own motion.—EQUITABLE FIRE INS. CO. v. WILDBERGER, Miss., 20 South. Rep. 859.

85. PRINCIPAL AND SURETY—Performance of Contract. —In an agreement for the construction of a sewer, the contractor undertook to "furnish all labor, materials, and tools necessary to execute the entire work," and gave a bond with sureties for the faithful performance of his contract: Held, that the sureties were not bound to pay third parties for materials used in performing the contract.—CITY OF STERLING v. WOLF, Ill., 45 N. E. Rep. 218.

86. PUBLIC LANDS—Patent — Cancellation. — The fact that the mortgagee of the holder of a patent certificate may not have had notice of the proceedings to cancel such certificate, or any opportunity to be heard therein, does not render void the action of the land department in canceling such certificate, but merely entitles him to a hearing on the question of the legality of the original entry in a proper action in court. In such action the burden of proof is upon him to make out a *prima facie* case, the certificate after cancellation being no longer any evidence to support his claim.—GUARANTY SAV. BANK v. BLADOW, N. Dak., 69 N. W. Rep. 41.

87. QUIETING TITLE. — Where a deed to land is procured from the owner by fraud, and he thereafter conveys the same land to another grantee, such second grantee can file a bill to set aside the first deed for fraud.—PRINCE v. DU PUY, Ill., 45 N. E. Rep. 298.

88. RAILROAD COMPANIES — Competing Lines — Exchange of Traffic.—A contract between railroad companies whose roads approach their point of connection almost at right angles, so that they cannot become competitors, to interchange traffic and cars, sell coupon passenger tickets, make through bills of lading, and apportion their earnings, is not unlawful.—CUMBERLAND VAL. R. CO. v. GETTYSBURG & H. RY. CO., Penn., 35 Atl. Rep. 952.

89. RAILROAD COMPANIES — Ejection of Trespasser—Servant's Authority. — In an action against a railroad company for injuries, it appeared that plaintiff got on a box car to steal a ride; and he testified that after the train started he was kicked off by one of the trainmen, and was injured: Held that, though plaintiff was a trespasser, if he was given no reasonable opportunity without exposing himself to danger, but was forced to leave the train while it was in motion, by force exercised by defendant's employees within the scope of their employment, and in so leaving; he received his injuries, defendant was liable.—CHESAPEAKE & O. R. CO. v. ANDERSON, Va., 25 S. E. Rep. 947.

90. RAILROAD COMPANIES — Defects in Foreign Cars—Fellow-servants.—Where a railroad company receives in its yard a car of another railroad, and such car is examined, and notice given that it is defective and is to be returned, the company has fulfilled its duty in regard to the car, and is not liable for injuries resulting from such defect, which an employee receives while the car is being shifted about the yard; the negligence in such case, if any, being that of his fellow-servants. — ATCHISON, T. & S. F. R. CO. v. MEYERS, U. S. C. C. of App., Seventh Circuit, 76 Fed. Rep. 443.

91. RAILROAD COMPANIES — Liability of Lessor. — A railroad company which allows other companies to run trains over its track is jointly liable with such other companies for injuries caused by their negligence. — CHICAGO & E. R. CO. v. MEECH, Ill., 45 N. E. Rep. 290.

92. REAL ESTATE AGENTS—Commissions.—Plaintiffs, as real estate agents, were authorized to sell certain lands at not less than five dollars per acre, but such authorization was not exclusive. Subsequently plaintiffs had some negotiations with a broker who offered to get a purchaser at less than the amount stipulated, upon a division of commissions. This offer plaintiffs refused. Some months later the broker obtained authority from defendants to sell the lands at five dollars, at a certain commission, and, under such authority, negotiated a sale: Held, that the fact that plaintiffs had negotiated unsuccessfully with the broker did not connect them with the sale, so as to entitle them to commissions. — DOUVILLE v. COMSTOCK, Mich., 69 N. W. Rep. 79.

93. RECEIVERS—Interlocutory Order—Pleading.—An interlocutory order appointing a receiver will not be reversed because of the insufficiency of the complaint to state a cause of action, as the complaint is still pending in the trial court, subject to amendment.—GRAY v. OUGHTON, Ind., 45 N. E. Rep. 191.

94. RELIGIOUS SOCIETIES — Action to Recover Donation—Parties.—Information will not lie by the attorney general, on the relation of the trustees of an unincorporated religious society, to recover funds donated for the erection or repair of the church building, since such society is a definite body, capable, under Pub. St. ch. 89, § 9, of maintaining suit itself for the right to hold and use gifts in the manner intended by the donors. — ATTORNEY GENERAL v. CLARK, Mass., 45 N. E. Rep. 183.

95. REMOVAL OF CAUSES—Actions at Law — Equitable Defenses.—Where, by the statutes of a State, equitable defenses may be made to an action at law, and such an action is removed into the federal court, matters in law and matters in equity must be separated, and equitable relief must be sought in a separate suit.—IN RE FOLEY, U. S. C. C. D., (Nev.), 76 Fed. Rep. 890.

96. REMOVAL OF CAUSES—Local Prejudice. — Defendant railroad company submitted affidavits showing that a few years previously there was a bitterly contested litigation between its predecessor in the possession of the road and the city in which the cause was to be tried; that during this litigation there was almost a riot; that several of the servants of such predecessor were arrested in consequence of the litigation, and that litigation still existed between itself and said city; and a number of respectable and disinterested witnesses testified that defendant could not obtain justice in that county, and that a prejudice against corporations existed there: Held, that it was proper to order the removal of the cause under Act March 3, 1887, though a number of witnesses testified that defendant could obtain justice in that locality.—HERNDON v. SOUTHERN R. CO., U. S. C. C., E. D. (N. Car.), 76 Fed. Rep. 398.

97. SALE—Collateral Warranty.—Where a warranty is part of a transaction of sal, no separate consideration is necessary to support it. — STANDARD UNDERGROUND CABLE CO. v. DENVER CONSOL. ELECTRIC CO., U. S. C. C. of App., Third Circuit, 76 Fed. Rep. 422.

98. SALE — Damages for Breach. — The measure of damages for refusing to accept and pay for the subject of a contract of sale is the difference between the contract price and the market value at the time when it should have been accepted, less expenses which the seller was saved by such refusal.—NEWARK CITY ICE CO. v. FISHER, U. S. C. C. of App., Third Circuit, 76 Fed. Rep. 427.

99. SALE—Passing of Title—Warranty.—Where all the terms of a sale of personal property which has been identified are agreed upon, and embodied in a writing signed and delivered, such delivery of the writing operates to pass title to the purchaser. Accordingly: Held, in the case of a sale of a mare, when the writing so made and delivered contained a stipulation that the sale was made without any warranty, that an oral warranty of quality, made an hour after the delivery of the writing, and made only as an inducement to the purchaser to accept and keep the mare, could not be enforced as a contract, such oral warranty being without consideration. — FLETCHER v. NELSON, N. Dak., 69 N. W. Rep. 53.

100. SALE OF UNINSPECTED FERTILIZERS. — The seller of commercial fertilizers, which had not been inspected as the law requires, cannot maintain against the buyer an action for the price of the same.—GOULDING FERTILIZER CO. v. DRIVER, Ga., 25 S. E. Rep. 922.

101. SALE TO AGENT — Liability of Principal. — Although the value of goods sold to an agent upon his own credit alone may, under certain circumstances, be recovered from the principal when disclosed, this, under the facts of the present case, could not be done unless the principal actually received and used or in some way got the benefit of such goods.—MICKLEBERRY v. O'NEAL, Ga., 25 S. E. Rep. 933.

102. SCHOOLS—Contract with Teacher.—A teacher's certificate, issued for three years, cannot be legally extended, by being changed to read for four years, by the secretary of the board of examiners who issued it, after he has gone out of office.—BRYAN v. FRACTIONAL SCHOOL DIST. NO. 1 OF SHELBY AND STERLING TPS., Mich., 69 N. W. Rep. 74.

103. TAXATION—Valuation of Property.—A contract by a mill corporation, by which it agreed, for a certain length of time, to discharge a sufficient quantity of water from its reservoir through its dam to maintain a certain flow in a stream below, where it bound the corporation to do no more than it was required to do by its charter in equalizing the flow of the stream, cannot be considered such an incumbrance that a sale of the stock of the corporation during the existence of

the contract would not measure the full value of its property for purposes of taxation.—WINNEPISEOGEE LAKE COTTON & WOOLEN MANUFG. CO. v. TOWN OF GILFORD, N. H., 35 Atl. Rep. 945.

104. TRIAL OF OFFENSES AGAINST ORDINANCES—Disqualification of Officers.—On the trial by a city council of an appeal taken by a defendant from a conviction before a member of such council while acting as mayor *pro tem.*, such member is disqualified from voting in the capacity of a juror.—CITY COUNCIL OF ANDERSON v. FOWLER, S. Car., 25 S. E. Rep. 900.

105. TRUST—Charitable Trusts—Validity.—A bequest to executors in trust to apply the income to the support and education of such indigent orphan children in a county as, in the judgment of the executors, may be the most deserving, and, after a certain time, to divide the principal among them, is not invalid as a charitable trust for uncertainty in the beneficiaries.—SAWTELEE v. WITHAM, Wis., 69 N. W. Rep. 72.

106. TRUST — Constructive Trust — Corporations.—If one party obtains the legal title to land by fraud, or by violation of a fiduciary relation, or in any other unconscientious manner, so that he may not equitably retain it, equity will impress a constructive trust upon the property in favor of one who is in good conscience entitled to it.—NESTER v. GROSS, Minn., 69 N. W. Rep. 89.

107. TRUST—Enforcement.—Testator gave a plantation with the property thereon, then occupied by J, his son-in-law, to M, his widow, for life, with remainder to his granddaughter S, with provision however, that a reasonable support out of the property was given J, and that the plantation should be J's home for life, and with further provision that, during the life of M, testator's grandchild B should receive from the property her education, maintenance and support: Held that, though J took sole possession of the property, and appropriated all the income, B could not maintain a suit to enforce her equitable rights, without proof that M declined to take steps to enforce the trust, and failed to furnish B with her support, etc.—BAILEY v. SELDEN, Ala., 20 South. Rep. 854.

108. VENDOR AND PURCHASER—Rescission of Contract.—Certain heirs agreed on a distribution of the estate, but one of them objected to the price fixed on certain land assigned to him, and refused to assent to the division. One of the other heirs thereupon agreed to take such land from him at the price affixed, giving a note secured by mortgage for the price, and also agreed to pay to certain of the other heirs money which, otherwise, the objecting heir would be compelled to pay: Held, that the purchaser was not entitled to rescind the contract of purchase because the objecting heir refused to convey on tender of the mortgage, where the payments which the purchaser had agreed to make for the benefit of such objecting heir had not been made.—GRIFFIN v. GRIFFIN, Ill., 45 N. E. Rep. 241.

109. WAREHOUSEMEN—Who Are.—On trial of a mill company's manager for shipping wheat stored in the company's warehouse without written assent of the holder of the receipt therefor, it appeared that, according to its usual course of business, known to the person whose wheat was shipped, all wheat received became a part of the consumable stock of the mill, was manufactured into flour and other mill products, and sold; that it satisfied its obligation to the depositors by paying them the market price when demanded, or by returning a like quantity and quality of other wheat; and that, in the former case, no storage was charged, but in the latter a charge of eight cents a bushel was made: Held, that the company was not engaged in the warehouse business, and the wheat was not received on storage, within Laws 1885, p. 61, regulating warehousemen.—STATE v. STOCKMAN, Oreg., 46 Pac. Rep. 851.

110. WILLS—Contest—Aliens.—A bill by an alien to set aside the probate of a will, merely alleging that his decedent died leaving certain land, excludes any presumption that personal property was left by him, and therefore he is not entitled to maintain the suit without showing his right, through treaty, to inherit; Laws 1887, p. 5, prohibiting aliens from inheriting land.—JELE v. LEMBERGER, Ill., 45 N. E. Rep. 279.

111. WILLS—Contest—Execution.—The execution of a codicil is a publication of the whole will as it then existed, so as to include additions attached to the original will before the execution of the codicil.—SHAW v. CAMP, Ill., 45 N. E. Rep. 211.

112. WILLS—Devise in Trust.—Testator bequeathed his property in trust to his executors to pay to his daughter an annuity of $600, and on her death to her children an annuity of $300 each until they arrived at the age of 25 years, at which time there should be paid to each child as he arrived at that age, $10,000. If, at the death of the daughter, any of her children were of the age of 25 years, the said sum should be paid in lieu of the annuity. At the termination of the trust as to all the beneficiaries and remainder-men, the property should be divided among the grandchildren then living. Held that, as the trust might, in case the children were born to the daughter after testator's death, be extended beyond a life in being and 21 years thereafter, it was void, as contrary to the rule against perpetuities.—LAWRENCE v. SMITH, Ill., 45 N. E. Rep. 259.

113. WILLS—Execution—Attestation.—Under Rev. St. 1894, § 2746 (Rev. St. 1881, § 2576), providing that no will except a nuncupative will, shall be valid unless it be signed by testator, or by some one in his presence and with his consent, and attested by two witnesses, the attestation clause need not recite compliance with such requirement. It is sufficient if the witnesses subscribe their names, as witnesses, opposite the word "witness."—OLERICK v. ROSS, Ind., 45 N. E. Rep. 192.

114. WILLS—Executory Devise — Failure of Issue.—A devise to testator's son D, "and his heirs forever, but, in case he should die without issue of his body, then the same shall go to the heirs of N, to them and their use forever," vests in D a fee, determinable on his dying without children surviving him; and hence the limitation over, being upon a definite failure of issue, is valid as an executory devise.—STRAIN v. SWEENEY, Ill., 45 N. E. Rep. 201.

115. WILLS—Intention—Evidence.—A beneficiary was entitled to the usufruct of the trust property so long as she lived, and and at her death it was to descend to her heirs, unless she devised it. Fearing that the property would pass under the provisions of a will which she had made, she procured from the legatees named therein a written acknowledgment that it was not her intention to exercise the power of disposing of the trust property, and that they disclaimed any interest therein under the provisions of the will making them residuary legatees: Held, that the acknowledgment was not competent evidence of the testatrix's intention, as expressed in a subsequent will.—EMERY v. HAVEN, N. H., 35 Atl. Rep. 940.

116. WILL—Precatory Trust.—A provision in a will which gives the widow of the testator all his property for her use while living, "requesting" her to have certain bequests paid to descendants of the testator named at her death, is sufficiently definite to create a trust in favor of such beneficiaries, which will be enforced by a court of equity on the death of the wife without having executed the power.—COULSON v. ALPAUGH, Ill., 45 N. E. Rep. 216.

117. WILL—Testamentary Powers—Execution.—Testator devised land to his wife, in trust that, if C married, and had "issue" and the wife thought it advisable to do so, she might convey the land to such "issue or children," and if no such conveyance was made, the land was to go to a township for school purposes: Held, that the interest of the children of C was dependent upon a conveyance by the wife, and therefore, where the land was conveyed by the wife to one child alone, the other children acquired no interest therein.—CHRIST v. SCHANK, Ind., 45 N. E. Rep. 190.